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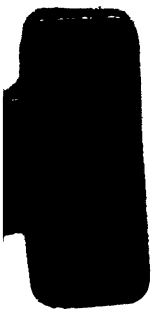
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RDD
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The Lackawanna Jurist

Containing Decisions of the Supreme
and Superior Courts of Pennsylvania
and the Various Courts of Lackawanna
County, Together with a Number of
Cases Decided in Other Courts between
January, 1909, and January, 1910.

VOLUME X.



Edited by **FRANK J. FITZSIMMONS,**
A Member of the Lackawanna County Bar.

SCRANTON, PA.

1910.

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Dillin's Estate, 161.

On Legacies.

In Re: The Estate of Rose. Foley, et al., minors, 349.

ISSUE.

No action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed. An ejectment cannot be tried without an issue; nor can a case be referred until "after issue joined."

Pastorick vs. Repash, 46.

Buss vs. Johnson, 104.

Pellio vs. Bull's Head Coal Co., 173.

JUDGMENT.

Rule For.

Webb vs. Scranton Yarn Finishing Co., 55.

McDonald vs. Williams Co., 110.

Holgate vs. Great Eastern Casualty and Indemnity Company, 121.

Collins vs. City of Philadelphia, 130.

Herr vs. Shoff, 136.

Perkins vs. Charleroi Paving Construction Co., 153.

Pastorik vs. Repash, 228.

Rule to Open.

An application to open a judgment entered on a judgment note is addressed to the equitable powers of the court and when the weight of the testimony is clear against the contention of the defendants the rule to open the judgment will be discharged.

Pietrewicz vs. Peterson, et ux., 56.

Seamans vs. Porteus, 203.

Seamans vs. Porteus, 215.

Standard Brewing Co. vs. Saracino, 231.

Davenport et al. vs. Monie, 238.

Priority and Assignment Of.

Short vs. D. & H. Co., 373.

Rule to Strike Off.

Gordon vs. Casey, 52.

JUROR.

Qualification Of.

The fact that a juror called to sit in a case in which his employer is a party is a good ground of challenge and should be sustained.

Huffnagle vs. D. & H. Company, 138.

JUSTICE OF THE PEACE.

Leamon vs. Mutual Insurance Company, 144.

Perkins vs. Charleroi Paving and Construction Company, 153.

Commonwealth v. Ostendorf. et al., 383.

LACHES.

In Re: Paving and Grading Larch Street, 367.

LANDLORD AND TENANT.

In the absence of any provision in a lease to the contrary a landlord is bound to keep the premises demised in tenantable condition, and any act of omission or of commission on the landlord's part which deprives the tenant of the proper use and enjoyment of the premises demised amounts to such an eviction as relieves the tenant of the obligation of paying rent.

Atherton vs. Shurtleff. 67.

Davenport, et al., vs. Monie, 238.

LEGACY.**Interest On.**

A provision in a bequest of income for life that the legatees, upon their attaining, or upon other persons attaining, a certain age, shall also be paid the principal and will not deprive them of interest from the date of the testator's death.

Enterman's Estate, 133.

Chargeable on Real Estate.

In Re: The estate of Rose Foley, et al. minors, 349.

LETTERS OF ADMINISTRATION.**Vacation Of.**

In Re: Hall Estate, 275.

LIFE ESTATE.

When a property is given to a person for life, and there is annexed to such gift a power of disposition of the reversion by the will, such person takes but the limited of estate expressly given, with a super-added power of disposition of the remainder.

Estate of Julia Terppe, deceased, 27.

Where testator leaves his estate, real and personal, to his wife for life or during widowhood, with power to use or sell the same for the benefit of herself or the estate, and no trustee named, the balance goes to her absolutely.

Kerstein's Estate, 262.

LIVERY STABLE KEEPER.

In an action against a livery stable keeper for the loss of a horse, the evidence being that the horse, boarded for a weekly stipend, was found lying upon the floor with his halter and chain on and his leg broken, but nothing to show how the accident happened, *Held*, binding instructions for the defendant were proper.

Kunz vs. Balzereit, 158.

MASTER AND SERVANT.

Butler vs. Kemmerer, 189.

MECHANIC'S LIEN—SCI. FA. SUR.

Where plaintiff, an architect, prepares two sets of plans for defendant's proposed building, the first set of plans is rejected and the second accepted, and the building is erected under the architect's supervision, his mechanic's lien holds good only as to the costs of the second set of plans and his services in supervising construction.

Morris vs. Christian, 65.

Central Loan and Investment Co. vs. Morgan, 76.

Williams vs. Rocky Glen Water Co., 233.

MINING OPERATIONS.

Boilers and Breakers.

Commonwealth ex rel. Moore vs. Murrin, 253.

Mines and Mining Operations.

Law Relating to, 297.

MINORS.

The right of a minor to select his guardian upon arriving at fourteen years of age, in lieu of a guardian appointed when he was under fourteen, is not an absolute and strict legal right, but is subject to the control and discretion of the Orphans' Court.

In Re: Rode Estate, 326.

NOTE.

Alteration Of.

Where A signs and delivers to B an ordinary printed form of promissory note, containing in writing the following clause varying the terms of the printed note, "This note is given to secure unpaid purchase money on real estate this day conveyed to me and to be paid in payments of two hundred and fifty dollars per year," and judgment is entered against A on his default in making payment as required by the written varying clause in the note, the mere allegation of an alteration of the note after execution and delivery must be clearly shown.

Reed vs. Reed, 116.

NOTE PROMISSORY.

Voluntary endorsements of payments on a promissory note, not under seal, will not toll the statute of limitations where the note has been executed more than six years.

Seamans vs. Porteus, 203.

Seamans vs. Porteus, 216.

NEGLIGENCE.

Where planks of a bridge had been used as long as such timber usually lasts it was negligence to omit proper precautions to ascertain their true condition, and if a defect existed so long that the Borough authorities, in the exercise of reasonable care and supervision, should have observed it, then it was negligence in not discovering and repairing it.

Gemeinder vs. Borough of Dickson City, 50.

The burden of proving negligence, with certain exceptions as to innkeepers and common carriers, is upon the bailor.

Kunz vs. Balzereit, 158.

The question of negligence and contributory negligence is ordinarily a matter for the jury, as also the question of whether a certain crossing over a railroad track is a country crossing.

Stone vs. N. Y. O. & W. Railway Co., 380.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

Where a child 15 years of age goes roller skating on the sidewalk of a municipality, where such use of the sidewalk is not prohibited by ordinance or interferes with the rights of pedestrians, and is injured by reason of a defect in the sidewalk without any contributory negligence a judgment against the municipality will stand.

Collins vs. The City of Philadelphia, 130.

Where a child of eleven years enters upon land on which an electric light company operates its plant and presumably puts his hand in through a broken window and receives a shock and is injured, neither child nor father can recover damages in the absence of any proof of gross negligence on the part of the defendant or any employee.

Rumovicz vs. Scranton Electric Company, 249.

Campbell vs. Olyphant Borough, 369.

ORDINANCE.

Ordinance—Borough.

In a suit upon a Borough ordinance a declaration averring that the ordinance is lost should at least set forth what the ordinance contained or the substance of it.

Shenandoah Borough vs. Bender, 151.

Ordinance—City.

An ordinance, forbidding the carrying of deadly weapons, to be valid, should have words similar to the following: "the intent therewith unlawfully and maliciously to do injury to any person."

City of Scranton vs. Allargie, 54.

PARTITION PROCEEDINGS.

In partition proceedings an auditor appointed to distribute the money arising from sale of real estate among those entitled to it has no authority to make distribution unless the several purparts are first definitely ascertained by a judgment of Court.

Murray vs. Murray, 219.

PARTNERSHIP.

Where a man is engaged in business and his son has been named as attorney-in-fact with general power to act for the father in all matters pertaining to the business and continues to act until the father's death, the fact that the father conveyed certain interests in the business to the son by papers which were signed but never delivered will not create or be considered evidence of a partnership.

Sears vs. The Scranton Trust Company, 1.

Sears vs. The Scranton Trust Company, Administrator, 19.

PLEADINGS.

In Ejectment.

Pastorik vs. Repash, 228.

Smith vs. Lehigh Valley Railroad Company, 257.

POWER OF APPOINTMENT.

The donee of a power of appointment may either in express terms or by implication render the estate over which she has the power assets for the payment of her debts.

Estate of Julis Terppe, deceased, 27.

PRIMARY ELECTIONS—ACT 1906.

In Re: Hall's Appeal, 205.

PROOF.

Burden Of.

Sears vs. The Scranton Trust Company, Administrator, 1.

The Reddington Company vs. Bellamy, 119.

Commonwealth vs. Sandoe, 166.

PROCESS.

Service Of.

Fenner, Admx., vs. Prudential Insurance Company, 370.

PUBLIC HEALTH.

Authority is given a commissioner of health under section 8 Act 22nd of April 1905, P. L., 260, to issue an order to discontinue the discharge of sewage into any water of the state, when in his opinion such discharge is injurious to the public health.

The right of appeal from this action is given by section 11.

Commonwealth vs. Turner, 79.

REFERENCE.

Buss vs. Johnson, 104.

REFeree.**Exceptions To Report Of.**

Pastorick vs. Repash, 46.

Dolphin vs. Borough of Olyphant, 74.

Patterson vs. Taylor, 84.

Eley vs. Rosato, 96.

Stipp vs. Hug, 100.

Buss vs. Johnson, 104.

Standard Brewing Co. vs. Saracino, 231.

REPLEVIN.**Procedure and Pleadings In.**

When plaintiff sues in replevin under old common law forms instead of under act of 1901, P. L. 88, a demurrer to the statement will be sustained.

Games vs. Gilder, et al., 234.

Defences to Writ.

Hall Safe Company vs. Walenk, 353.

RES ADJUDICATA.

Butler vs. Kemmerer, 189.

REWARD.**Petition For.**

Commonwealth vs. Sandoe, 166.

SCIRE FACIAS.**Service Of.**

McDonough vs. Lydon, 221.

SEWER—BOROUGH.

Where, in the construction of a Borough Sewer a tax payer files a bill on the ground that the contract involved the creation of a municipal debt in excess of the constitutional limit of two per cent, with nothing to support this averment except a clause to bind the Borough for any amount not secured through special assessments of private property as benefits, and the ordinance providing for the improvements limits the liability of the Borough to the amount so secured, the preliminary injunction will be dissolved.

Sterrick Creek Coal Company vs. Borough of Winton, 266.

SHERIFF'S SCHEDULE OF DISTRIBUTION.**Exceptions To.**

A vendor of real estate cannot blend purchase money indiscriminately with labor and materials and secure the whole through a mechanic's lien as against the mortgagee of vendee.

Central Loan & Investment Company vs. Morgan, 78.

SON.**Rule to Support.**

Overseers vs. Irwin, 184.

STATEMENT.**Demurer to Plaintiff's.**

Commonwealth vs. O'Connell Construction Company, 102.

Jefferson Association vs. Moyer, 169.

Rule to Amend.

A motion to amend so as to enlarge the amount of a claim will be denied where it would introduce a new cause of action, barred by the statute of limitations. There was nothing to show that the defendant was bound to settle before the proceeds of a sale were fully realized. The thing entrusted to him was in the nature of an entire contract.

Gregory vs. Huslander, 97.

STATUTE OF LIMITATIONS.

Seamans vs. Porteus, 203.

Seamans vs. Porteus, 216.

STOCKHOLDER.**Rights Of.**

Where a stockholder in a corporation seeks an accounting from those in charge of the corporation's business it must be shown that there was some mismanagement or other action prejudicial to the plaintiff's right.

Pellio vs. Bull's Head Coal Company, 173.

SUMMONS.**Service Of.**

Leaman, vs. Mutual Insurance Company, 144.

The "place of business" of defendant, within the Act of July 9, 1901, P. L. 614, relating to service of process, means the permanent location at which the business of the firm or corporation is done, and not the temporary location of workmen engaged in some contract.

Where a sheriff's return of service of a writ of summons is full and explicit upon its face, it cannot be set aside upon a rule and evidence showing that service was not in fact made at defendant's place of business, but for such purpose a plea in abatement is necessary.

Fahs vs. York Bridge Company, 146.

Amendment Of.

Murphy vs. Booth, 259.

SURFACE WATER.**Increased Flow.**

Fleming vs. Connellsville Borough, 377.

TAXES.**Lien Of.**

Eckert vs. Krugerman, 217.

TAX COLLECTOR.**In Re: Appointment Of.**

The favoring of the appointment of a certain person for tax collector by municipal bodies, which levy the taxes, will be duly considered by the court, in making the appointment. In Re:—Appointment of Tax Collector for Blakely Borough, 93.

THIEF—HORSE.

A person who furnishes information leading to the arrest of a horse thief, or who assists a constable in making the arrest, is not entitled to the reward of \$20 provided for in the Act of March 15, 1821, P. L. 90.

Commonwealth vs. Sandoe, 166.

TRESPASS.

Huffnagle vs. D. & H. Co., 138.

TRIAL.**Rule For a New.**

Hinks and Johnson vs. Chichura, 48.

Gemeinder vs. Borough of Dickson City, 50.

Morris vs. Christian, 65.

Atherton vs. Shurtleff, 67.

Hackett vs. Shepherd, 81.

McDonald vs. Williams Company, 110.

Collins vs. City of Philadelphia, 130.

Kunz vs. Balzereit, 158.

Dymond vs. Dymond, 323.

TROVER AND CONVERSION.

It is a generally accepted rule that trover will lie for the conversion of shares of stock.

Patterson vs. Taylor, 84.

TOWNSHIP TAXATION FOR ROAD PURPOSES.

In accordance with the act of 12th of April, 1905, P. L. 142, the electors of a township adopted the system of money taxation for public roads. Subsequently a petition was presented to court for leave to submit at the next election the question of changing again to the former system, known as the work tax.

Held: The right given to townships is to "change" the system. As such it must be taken to govern the sense in which "abolish" is used in the subordinate clause where it occurs. The order will, therefore be granted as prayed for.

In Re: Changing the System of Taxation for Road Purposes in Benton Township, 24.

TRUST—RESULTING.

The evidence of establishing a resulting trust, especially when arising ex maleficio, which is an imputation of fraud, should be clear, explicit and unequivocal. The necessary facts must not only be shown, but must also be averred in the pleadings.

Barber vs. Barber, 39.

TRUST.**Termination Of.**

Dillin's Estate, 161.

VIEWERS.**Exceptions to Report Of.**

Where viewers are appointed to view and lay out a public road, exceptions to the report having been first regularly filed, and additional exceptions are filed after the regular time, without leave of court, such additional exceptions will not be permitted to be filed "nunc pro tunc" on motion, when they raise issues dehors the record.

In Re: Public Road in Scott Township, 118.

Oath Of.

Public Road in N. Abington Township, 171.

Petition to Strike Off Report.

In Re: Paving and Grading Larch Street, 365.

WAGES.**Attachment Of.**

Antreason vs. Samarsien, 129.

Jenkins vs. Davis, 357.

WILLS.

Estate of Julia Terppe, deceased, 27.

Construction Of.

Dillin's Estate, 161.

Where it is claimed that a decedent left a later will than the one which has been probated it is the duty of the proponent of the later will to appeal from the register to the Orphans' Court; and on prime facie proof of the later will it is to be produced and proved before the Register in the usual manner.

In Re: Estate of Mary Lynn, 214.

WRITTEN INSTRUMENT.**Reformation Of.**

Standard Brewing Co. vs. Saracino, 231.

Hall Safe Co. vs. Walenk, 353.

In the Court of Common Pleas of Lackawanna County.

No. 30, September Term, 1908.

In Equity.

Sur Bill and Cross Bill and Issue Thereon.

*Between Grover C. Sears, Plaintiff, and the Scranton Trust Company,
Administrator, etc., of Charles H. Sears, Deceased, Defendant.*

ALSO,

*Between The Scranton Trust Company, Administrator, cum testamento
nexus of Charles H. Sears, (plaintiff in the bill), and Fred C.
Lidstone (a new party in the cross bill.)*

Plaintiff sought an accounting of the estate of his deceased father, with whom he claimed to have been a partner within the last years of his life.

By answer the defendant denied the existence of any partnership, impeached the validity of the writings exhibited in the bill by which the partnership was alleged to have been created and vested with title to the assets in dispute, both real and personal; and, by its cross-bill, sued to have the writings annulled and cancelled and also an accounting from plaintiff in the bill for such part of the assets as he was alleged to have tortiously converted to his own use since his father's death.

The assets in controversy consisted of three parcels of land with improvements. There were two grist mills equipped with machinery for the milling business, on the said land.

From the time the deceased acquired title to the respective properties in question he was in possession of them, carrying on in his own name a general milling business until the time of his death. There was no apparent change of ownership or possession at any time, nor business done otherwise than in his name so long as he lived. For some few years next before the death of deceased the plaintiff had been in his service and was entrusted with a good deal of confidence in respect to his father's property and about handling the trade at the mills and the receipt of moneys derived therefrom.

On January 24, 1908, he was formally appointed by his father as his attorney in fact, with general power to act for the father in all matters pertaining to the business. The agency was not surrendered by the son in the father's lifetime.

By his will, dated August 20, 1907, the deceased devised all his estate without exception to his wife, "to have and to hold and enjoy the same for her own use and benefit forever.

Plaintiff founded his alleged right on three instruments of different dates, but apparently formed one transaction. The second is Exhibit B. in the bill and is an article of co-partnership between the plaintiff and his father, dated February 3, 1908. It recites the father's milling business and further stipulates for the presents delivered unto the partner as follows: The son to "give his undivided services to the business undertaken by the partnership as against the capital contributed by the father." The contribution of the latter is described thus: "The said C. H. Sears has on the date of these presents delivered until the partnership the following capital, to wit: a milling property in Chinchilla, etc."

The deed for said property was not to be recorded during the lifetime of deceased's wife. Having been acknowledged the deed was left in the father's possession. As to the subject matter of the deed as well as all the other assets no change of possession or apparent change of ownership followed. No partnership business was ever done, nor was any business ever "undertaken by the partnership." At the father's death the plaintiff asserted no right as a surviving partner. At the time of his renunciation of his right to administer when the temporary management of the mills were under discussion he asserted no such claim, but solicited an agency under the administrator.

Held: In the light of these facts it is believed that the partnership agreement was never consummated by the delivery of the papers upon which the plaintiff's case depends and that the projected partnership was abandoned by mutual consent of the parties. It was further found that the papers were executed by the father without consideration moving either from the plaintiff or from any other source.

In this action the son has the burden of showing clear and distinct proof that the gift was fully executed by the delivery of the papers, and that it was intended to and did take effect in conformity with the writings. In the absence of any ostensible change of proprietorship and in view of the disputed continuance of the relation of principal and agent with respect to the property, such proof is wanting; and the evidence is insufficient to warrant the conclusion that an actual partnership ever existed in the premises, or that the plaintiff ever acquired any interest in the disputed property.

The evidence only warrants the conclusion that such partnership was proposed and the writings exhibited in the bill were made and executed accordingly, but that before their final consummation by delivery or anything having been done in pursuance of it the proposal was abandoned by mutual consent of the parties, and hence the plaintiff in the bill is not entitled to the relief asked for and his bill should be dismissed at his cost.

Messrs. Vosburg & Dawson, and Mr. Mr. Fred C. Lidstone, for plaintiff.

Mr. George D. Taylor, for defendant.

Opinion by Newcomb, A. L. J., January 4, 1909.

CONCLUSIONS OF FACT AND LAW AND DECREE NISI.

The Trust Company was erroneously named in the bill as executor instead of administrator of Charles H. Sears, deceased, with the will annexed as described in the cross-bill. The bill will, therefore, be treated as amended in that particular. The widow of the deceased and his son, David Sears, were made co-defendants in the bill with the administrator, but at the trial plaintiff was allowed to amend by striking out their names. That disposed of demurrers which they had filed. In the cross-bill a new party was brought in as co-defendant with Grover C. Sears.

The latter by his bill seeks an accounting from the estate of his deceased father with whom he claims to have been a partner during the last few months of his life. There was also a prayer for a receiver.

By its answer the Trust Company denies the existence of any partnership, impeaches the validity of the writings exhibited in the bill by which the partnership is alleged to have been created and vested with title to the assets in dispute, both real and personal; and, by its cross-bill sues to have the writings annulled and canceled and also an accounting from the plaintiff in the bill for such part of the assets as he is alleged to have tortiously converted to his own use since his father's death.

After answer filed to the cross-bill the parties agreed to the appointment of a temporary receiver to take charge of all the property in dispute without prejudice. The appointment was so made October 24, 1908, and the custody of the property has been in the hands of the receiver ever since.

From the pleadings, evidence and arguments of counsel I find the following

CONCLUSIONS OF FACT.

1. The assets in controversy consist, first, of three parcels of land with their improvements in South Abington township, this county. Two are at the village of Clark's Summit and the other at Chinchilla, all on the main public road extending northwesterly from this city. Chinchilla is just beyond the city line and the other parcels but little more than a mile distant from the Chinchilla property. The latter is a lot measuring about six perches on three sides by about five and one-third on the fourth side, improved with a steam grist mill equipped with machinery for the milling business. Its value is \$2,750. The stock on hand there at the time the receiver was appointed is estimated at \$82.25. It was conveyed to Charles H. Sears, the plaintiff's father, by J. W. Leach and wife, by deed of January 31, 1902, recorded in this county in deed book 189 at page 477.

One of the Clark's Summit parcels, somewhat irregular in shape, has an average width of about 86 feet by an average length of 173 feet, and is improved with a like mill and appurtenances. It was conveyed to Charles H. Sears by deed of W. V. Good and wife, dated 16th May, 1898, recorded in this county in deed book 162, at page 512. Its value is \$7,500. The stock there on hand at the time of the receiver's appointment is estimated at \$428.90. The other lot at the Summit adjoins this

one and contains about 45 square perches of land. It is improved with three small buildings, one of which is a dwelling house and the others a barber shop and store house, respectively. It was conveyed to Charles H. Sears by deed of F. W. Tennant and wife dated 26th June, 1907, recorded as aforesaid in deed book 239, at page 125. Reference is made to the several records mentioned as well as to the pleadings for a more particular description of the respective lots. The value of the last mentioned property is \$1,500.

The other assets at the time of the receiver's appointment in October, 1908, appraised at their face value, are as follows:

Notes	\$ 591.94
Ledger accounts	6,677.68

The deceased had no other property, so far as the evidence shows, except a house and lot in this city worth about \$3,500.

2. The notes and accounts were all in the name of the deceased.

3. Charles H. Sears died July 2, 1908, at the Oppenheimer Institute in New York city, where he had been taken by a physician for medical treatment. What the character of his fatal illness was does not appear. He had collapsed while at the mill in Clark's Summit the day before and was taken to New York that night. In the later years of his life he had been addicted to excesses in the use of alcoholic liquors, the habit growing in degree from year to year. During the last year of his life there was some impairment of his health and strength, but to what extent is, under the evidence, uncertain. From the time he acquired title to the respective properties in question he was in actual possession of them, carrying on in his own name a general milling business until the time of his death. There was no apparent change of ownership or possession at any time, nor business done otherwise than in his name, so long as he lived.

4. At the time of his death his age was 57 years. Besides a widow he left to survive him two sons, namely, Grover C., the plaintiff in the bill, aged 22 years, and David, aged 32 years. For some few years, next before the father's death, the younger son had been in his service. As such he was entrusted with a good deal of confidence in respect to the father's property and about handling the trade at the mills and the receipt of moneys derived therefrom. January 24, 1908, he was for-

mally appointed by the father as his attorney in fact, with general power to act for the father in all matters pertaining to the business. This agency the son accepted, exercising it so long as the father lived. He also collected and gave receipts in the father's name for the rents arising out of the premises adjoining the Clark's Summit mill property. The letter of attorney made special reference to the father's banking and in particular authorized the son not only to make deposits, but also to endorse and discount notes and to draw on the bank account either by check or acceptance in the father's name. A duplicate or copy of this paper was placed with the bank in which the account was kept, and up to and during the last month of the father's life the son was exercising his agency in the premises, by drafts in his father's name signed by the son as "atty" in the transaction of the business in question. What the state of the bank account was on the date of the father's death does not appear. The agency was revokable, but it was neither revoked by the father nor surrendered by the son in the father's lifetime. Reference is made to the administrator's request for conclusions of fact for a copy of this instrument.

By his will dated August 20, 1907, duly probated and registered July 8, 1908, in this county, the place of his domicile.

Charles H. Sears devised all his estate without exception to his wife, Mary E. Sears, "to have and to hold and enjoy the same for her own use and benefit forever." He further provided as follows: "And to the end that my said wife may not be burdened with the care and management of my real estate, and that she may realize and enjoy the greatest income and benefit from the same, I do hereby order and direct that all my real estate, lands and tenements be sold by my said executor hereinafter named for the best price or prices that can be gotten for the same, my said executor to exercise his best judgment as to the proper time to sell the same to realize the greatest value in cash or its equivalent to my estate, and until the said real estate is sold I do hereby empower my said executor to rent and collect the rents for the same for the use and benefit of my said estate, keep the buildings in necessary repair and keep the property insured against fire." He then named "The Title Guaranty & Trust Company of Scranton" sole executor with "full power to make, execute and deliver all necessary deeds and con-

veyances for sale and passing of a good title to my real estate as above directed." A copy of the will is made exhibit A in the cross-bill to which reference may be had for its contents.

6. The Title Guaranty and Trust Company had ceased to execute trusts, that business having passed to the Scranton Trust Company, a corporation under the same ownership and management. Therefore, upon renunciation by the Guaranty Company as well as by the widow and children, The Scranton Trust Company was granted letters of administration with the will annexed and thereupon asserted its rights of control and management of the assets in controversy, both real and personal, in accordance with the terms of the will. There was some objection both by the plaintiff and his brother David to renouncing in favor of the Trust Company except upon condition that the Company should commit the management of the mills to them. This was withdrawn and the renunciation signed on the advice of the Trust Officer that a request to that effect from their mother, as sole beneficiary, would probably have great weight with the executive committee of the Company in determining that question. Inferentially it would appear that no such request was made, and on the 5th of August the plaintiff filed his bill for an accounting.

7. He found his alleged right on three instruments of different dates, but apparently forming one transaction, and all shortly after his letter of attorney of January 24, 1908. First, is a deed from his father to F. W. Lidstone, trustee, conveying in fee for a nominal consideration the mill properties and the other lot at Clark's Summit. This is dated January 28th and acknowledged January 30, 1908. It was recorded in this county July 14, 1908, in deed book , at page . It is designated as exhibit A in the bill. The second is exhibit B in the bill and is an article of co-partnership between the plaintiff and his father, dated February 3, 1908. It recites the father's milling business at both mills and refers to the premises adjacent to the Summit mill, as also in his possession and likely to become an appurtenance to that mill in the future, and stipulates that the parties engage to become equal partners in the business for the term of thirty years unless the agreement be dissolved in the meantime "by mutual consent or otherwise." It further stipulates for the mutual contributions of the partners as follows: The

son to "give his undivided services to the business undertaken by the partnership as against the capital contributed by the father." The contribution of the latter is described thus: "The said C. H. Sears has on the date of these presents delivered unto the partnership the following capital, to wit: a milling property in Chinchilla known as the Chinchilla mill; a milling property in Clark's Summit known as the Clark's Summit mill; an improved dwelling and building property consisting of three rentable premises, being adjacent to the mill property at Clark's Summit, all of which being now held in trust by Fred W. Lidstone, the same being deeded to this partnership on the signing of these presents. Also all the machinery, etc., which has been used by the party of the first part in his mills, also the wagons, teams, etc., used in the business except his private driving horse and carriage; also all the stock of grain, hay, provisions and stock in trade now in the mills or ordered and still en route; also all the bills, choses in action, claims, etc.; all demands, etc., which said Charles H. Sears now has against any persons, corporation or partnership which directly or indirectly appertains to or were contracted with the said Charles H. Sears by reason of his milling business."

The third paper—exhibit C in the bill—is a deed from Fred W. Lidstone, trustee, to "Chas. H. Sears and Grover C. Sears, trading as partners under the firm name of C. H. Sears & Son." It was dated February 11, 1908, and conveyed the same land held by the trustee by the deed of January 28, 1908. Both deeds were recorded at the same time.

8. The deed of January 28th, to Lidstone, trustee, was executed and acknowledged in Mr. Sears' office at the Clark's Summit mill. Whether the trustee was present or not isn't clear. The evidence makes it at least doubtful. But the grantor's son, plaintiff in the bill, was there. The acknowledgment was taken by Mr. Nicholls, a justice of the peace. Mr. Sears told him he was going to take the son in the business and expressed the opinion that the intervention of a trustee was necessary in order to transfer the real estate to the partnership. He also said that the deed was not to be recorded during the lifetime of his wife. Having been acknowledged the deed was left in his possession. As to the subject matter of the deed as well as all the other assets no change of

possession or apparent change of ownership followed. No partnership business was ever done, nor was any business ever "undertaken by the partnership." But from the date of the papers the business continued to be done as theretofore, the son acting only as his father's agent and attorney in fact, while the ostensible control, ownership and possession remained exclusively with the father. At the father's death the son asserted no right as the surviving partner. At the time of his renunciation of his right to administer when the temporary management of the mills was under discussion the son asserted no such claim, but solicited an agency under the administrator. The existence of a partnership wasn't suggested to the administrator until some days thereafter, probably about the time the deeds, through which the son now claims, were filed for record, viz: July 14, 1908.

9. In the light of these facts it is believed that the partnership agreement was never consummated by the delivery of the papers upon which the plaintiff's case depends and that the projected partnership was abandoned by mutual consent of the parties. It is accordingly so found. It is further found that the papers were executed by the father without consideration moving either from the son or from any other source. The day before his death, July 1, 1908, was the last time the father was at the mill. It is believed the papers were then either in his desk or else in the hands of Mr. Lidstone, who had acted as his trustee and attorney in the transaction. The son first conceived the notion of claiming a partnership interest after the failure of his effort to secure the management of the property under the administrator. Having access to his father's papers he then filed the deeds for record and now asserts his claim in bad faith.

10. Accordingly at sometime after letters of administration were granted the son assumed personal charge of the mill at Clark's Summit, and between that time and the date of the receiver's appointment he did some business there, indefinite in character and extent. There is no evidence that he did any business as the surviving member of the alleged co-partnership.

Out of the foregoing facts arise the following

CONCLUSIONS OF LAW.

1. The several writings upon which the plaintiff in the bill founds

his claim operate as one instrument. On their face they import a voluntary gift of a large part of the father's property to his son. At that time, and at all times thereafter during the donor's life, a highly confidential relation existed between the parties, with respect to the subject matter of the gift.

2. Therefore, in this action the son has the burden of showing by clear and distinct proof that the gift was fully executed by the delivery of the papers, and that it was intended to, and did take effect in conformity with the writings.

3. In the absence of any ostensible change of proprietorship and in view of the undisputed continuance of the relation of principal and agent with respect to the property, such proof is wanting; and the evidence is insufficient to warrant the conclusion that an actual partnership ever existed in the premises, or that the son ever acquired any interest in the disputed property.

4. The evidence only warrants the conclusion that such partnership was proposed and the writings exhibited in the bill were made and executed accordingly, but that before their final consummation by delivery or anything having been done in pursuance of it the proposal was abandoned by mutual consent of the parties, and

5. Hence the plaintiff in the bill is not entitled to the relief asked for and his bill should be dismissed at his cost.

(AS TO THE CROSS-BILL.)

6. The evidence is insufficient to warrant the conclusion that the papers were executed at a time when Charles H. Sears was laboring under mental incapacity.

7. Whether the relation of trust and confidence between the father and son gives rise to the presumption that the papers are voidable as involving a breach of the trust on part of the son need not be decided. In effect that question becomes irrelevant in view of the conclusion that the papers were never delivered nor the property transferred to the partnership. The same is true as to the allegation of the father's insolvency.

8. The testator died seized and in possession of the property. So far as it consists of realty his will worked an equitable conversion. The duty of actual conversion is with the administrator, plaintiff in the cross-

bill, who succeeds to the right of possession in order to carry the testamentary provisions into effect.

9. The invalid papers under which the son claims form a cloud on the title to the trust estate in the hands of the administrator. The latter has "power to make, execute and deliver all necessary deeds and conveyances for sale and passing of a good and lawful title to" the testator's real estate, and is bound to sell the same for the best price in its judgment obtainable. The invalid deeds having been recorded since the administrator's succession, and a pretended right thereunder now being asserted by the testator's son, they form a manifest obstacle to the execution of the trust created by the will.

10. Under the pleadings and counter pleadings the court has jurisdiction in this proceeding of the whole subject of controversy and may decree the cancellation of the writings out of which it arises in order to avoid multiplicity of actions.

11. Mr. Lidstone was merely a formal party to the proposed transfer of the property, and while he joined in the answer to the cross-bill he is no a necessary party to the decree to be entered, but was a necessary party to the cross-bill.

12. The writings exhibited in the bill as the title papers under which the plaintiff therein makes claim are null and void and should be cancelled. He, the said Grover C. Sears, should be directed to surrender and deliver them to the court for cancellation. He should be further ordered and directed to deliver to the Scranton Trust Company, administrator, etc., all and singular the papers of every description whatsoever which have come to this hands or are within his control in anyway howsoever touching the estate or former business of his deceased father, together with any moneys, funds or any other thing of value which he may have in his hands or within his control and which were derived from said business or estate. He should be further ordered and directed to account to said administrator for all moneys that have come into his hands out of his father's business in his lifetime or out of the property in dispute since his father's death, and all such moneys pay over to the administrator.

13. The plaintiff in the bill, Grover C. Sears, should pay the costs.

Let a decree *nisi* be entered in accordance with the fifth, twelfth and thirteenth conclusions of law. Exceptions, if any, to be filed within ten days after notice to the parties *sec. reg.*

REQUESTS FOR SPECIFIC CONCLUSIONS ON PART OF PLAINTIFF IN THE BILL.

FIRST—CONCLUSIONS OF FACT.

1. That Charles H. Sears and his wife by deed duly executed and delivered conveyed to Fred W. Lidstone, as trustee, certain real estate in the county of Lackawanna including two properties used as grist mills; that articles of co-partnership were executed by and between Charles H. Sears and Grover Sears, the plaintiff, for the conduct of the milling business; and that a deed was delivered to said Charles H. Sears and Grover C. Sears as co-partners by Fred W. Lidstone, trustee. These deeds and agreements formed a part of the same transaction by which the property of Charles H. Sears was conveyed to a firm of which he was a member, the other member being the plaintiff, Grover C. Sears.

Answer: It is not so found except that the execution of the papers was in effect one transaction.

2. That at the time when these papers were executed Charles H. Sears was in possession of his mental powers sufficiently so that he could understand the nature and character of his act, and he was not unduly influenced in any way to do so by Grover C. Sears or anyone acting for him.

Answer: It is so found as to the grantor's mental capacity. As to undue influence it is believed to be irrelevant under the general findings and therefore I decline to find either way.

3. Under the evidence in this case the said transfers and agreements were made in good faith on the part of both parties concerned, both parties possessing sufficient mental capacity to understand the nature and character of the acts, and no fraud was practiced or perpetrated upon Charles H. Sears by anyone to secure the execution of said papers.

Answer: It is not so found.

4. The partnership between Charles H. Sears and Grover C. Sears continue from the time the papers between them were executed to the date of the death of Charles H. Sears.

Answer: It is not so found.

5. After the death of Charles H. Sears, Grover C. Sears continued to run the business as surviving partner until the appointment of a receiver by this court, which appointment was made in pursuance to a bill filed by Grover C. Sears and upon the agreement of all parties in interest.

Answer: It is not so found.

6. Under the evidence in this case, the mind of Charles H. Sears was not so impaired by the use of alcoholic liquors that he could not understand the nature and character of the transactions between himself and Grover C. Sears by which his property was conveyed through the medium of a trustee to the partnership composed of himself and his son Grover C. Sears.

Answer: As to mental impairment it is so found. The balance of the request is not so found.

7. That there was a partnership existing by and between Charles H. Sears and Grover C. Sears from the time the deed was made from Fred W. Lidstone to them as partners up to the date of the death of Charles H. Sears.

Answer: It is not so found.

SECOND. CONCLUSIONS OF LAW.

1. An administrator has no standing in law to file a bill in equity to annul a conveyance of real estate on the part of a decedent, of whose estate he is administrator, on the ground that the transfer was made in fraud of creditors.

Answer: As a general proposition this is affirmed with respect to a mere administrator.

2. It is not material in this case to determine whether or not Charles H. Sears was solvent at the time he executed the deed to Grover C. Sears, through a trustee, for a partnership interest in the land described in the deed.

Answer: Affirmed.

3. Undue influence in order to avoid a deed or a will must be such as to destroy the free agency of the testator at the time and in the very act of making the instrument, and there is no evidence in the case whatever to show any influence exerted upon Charles H. Sears by Grover C. Sears.

Answer: As an abstract general proposition the principle stated is affirmed. As to the balance of the request it is held that there is no affirmative evidence of undue influence.

4. There is no such relation shown by the evidence to exist between Charles H. Sears and Grover C. Sears as would put the burden upon Grover C. Sears of proving that there was no undue influence. In this case the burden is upon those who seek to set aside the conveyance to establish the undue influence.

Answer: This is refused as irrelevant under the general conclusions.

5. The evidence in this case is not sufficient to show that at the time when the papers were executed by which an interest in the real estate and business was transferred by Charles H. Sears to Grover C. Sears, Charles H. Sears was not capable of understanding the nature and effect of the papers he signed.

Answer: This is refused as assuming that an interest in the property was in effect transferred.

6. Under the evidence in this case Charles H. Sears possessed sufficient mental capacity to understand the nature and character of the papers signed by him by virtue of which an interest in the business and real estate was transferred to his son Grover C. Sears, and this transfer was valid and vested a one-half interest in the same in Grover C. Sears as a member of the firm of C. H. Sears and Son.

Answer: This is refused for the same reason.

7. The cross-bill filed in this case against Grover C. Sears has not been sustained and should be dismissed at the cost of the Scranton Trust Company, administrator of the estate of Charles H. Sears.

Answer: Refused.

8. The bill filed by Grover C. Sears against the Scranton Trust Company, administrator of the estate of Charles H. Sears, is sustained.

by the evidence in the case, and the plaintiff therein is entitled to an accounting from the defendant as to the partnership.

Answer: Refused.

REQUESTS ON PART OF PLAINTIFF IN CROSS-BILL.

FIRST. CONCLUSIONS OF FACT.

All but the seventh request are believed to be covered by the general findings so far as they are relevant, and specific answers would therefore be unnecessary repetition.

7. That on the 24th day of January, 1908, the said Charles H. Sears made and delivered to the said Grover C. Sears, in writing, over the proper hand seal of him, the said Charles H. Sears, a power of attorney, of which the following is a true and exact copy, viz.: "Know all men by these presents, that I, Charles H. Sears, of the City of Scranton, County of Lackawanna, Pennsylvania, have made, constituted and appointed, and by these presents do make, constitute and appoint Grover C. Sears, of the said city, my true and lawful attorney for me and in my name to carry on generally my grain milling business at Clark's Summit and at Chinchilla, in said county, to purchase on my account grain and all other things needed or required to effectually carry on said business, and out of my moneys to pay any and every bill which I may owe, to collect and receive from any and all persons all moneys due or owing to me and therefor sufficient receipts and acquittances to give in my name, and in my name to deposit my moneys in bank and on any bank where moneys stand or shall stand to my credit to give all manner of checks and accept all manner of bills of exchange, as to him shall seem discreet; and especially do I empower him to endorse my name on all promissory notes payable to my order and after endorsement to discount the same in bank to the credit of my general account, with power also an attorney or attorneys under him to make and substitute in and concerning the premises, and the same at his pleasure to revoke. Giving and granting unto my said attorney, or his substitute or substitutes, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in about the premises, as fully to all intents and purposes as he might or could do if personally present; hereby ratifying and con-

firming all that the said attorney, or his substitute or substitutes, shall lawfully do or cause to be done therein by virtue of these presents. In testimony whereof, I have hereunto set my hand and seal the — day of — in the year of our Lord one thousand nine hundred and eight.

“Signed, sealed and delivered in presence of

C. H. Sears, [L. S.]”

“State of Pennsylvania, Lackawanna County, ss:

“On the 24th day of January, in the year one thousand nine hundred and eight, before me, the subscriber, came the above named Charles H. Sears and acknowledged the within written power of attorney to be his act and deed, and described the same might be recorded as such.

“Witness my hand and official seal.

“George D. Taylor, [L. S.]

“United States Commissioner.”

Answer: It is so found.

The administrator's requests for conclusions of law are covered by the general conclusions to which reference is made for answers thereto.

DISCUSSION.

Had there been any real consideration for the partnership agreement a different question might have been presented. There was none and on that score the case is free from substantial dispute. The only consideration suggested or capable of suggestion is that mentioned in the article of co-partnership, viz.: the stipulation of the son to give his “undivided services” to “the business undertaken by the partnership.” While mutual promises may form the consideration of a contract their effect as such is cognizable only in an action at law for damages for a breach of the contract. Where the proceeding is for specific relief in its enforcement the question is, what, if anything, did the plaintiff give? Was the consideration executed, or merely executory? Here the unaccepted offer was to give his services to such business as the proposed partnership should undertake. It undertook nothing. He never sought to have it undertake anything. He undertook nothing on its behalf nor in its name. It cannot be said, therefore, that he gave anything. His services, whether divided or undivided, were given, there-

after as theretofore, not to a partnership but to his father's business in his capacity as agent or attorney in fact. This status had been defined in writing less than a week before the partnership was projected. As so defined it was never treated as having been disturbed by the partnership proposal. *Prima facie*, to say the least, the son could not at the same time be both attorney in fact for and co-partner with the father with respect to the same subject matter. The co-existence of two such distinct relations is so anomalous that nothing short of clear and convincing proof that such was the *bona fide* intention of the parties would sustain it even where no innocent third party was to be prejudiced. Here there is no such proof, nor was there any breach in the continuity of the son's ostensible service as the father's formally constituted agent. The conclusion is irresistible that, for reasons of their own, after the partnership papers were formulated and without having put them in effect, the proposal was mutually abandoned and the son elected to continue as the father's agent. Especially is this so when it is viewed in the light of the son's attitude after the father's death in seeking a similar appointment at the hands of the administrator. True, there is some evidence that Mr. Sears was heard to say that he had taken his son in business or was going to give him an interest in it, etc. These declarations are, at best, of vague and uncertain import unconnected with any corresponding partnership act. If the papers had ever taken effect there would have been some act in evidence at least tending to show a change of proprietorship. The son wouldn't have been confined to evidence of mere declarations. The relation of the parties at the inception of the son's claim could hardly have been more highly confidential. It is urged that the burden of affirmative proof as to the fairness of the transaction and the good faith of the beneficiary is thus cast upon the son under the doctrine of a long line of cases of which the following are examples:

Greenfield's Estate, 14 Pa., 489; Wistar's Appeal, 54 Ib., 60; Darlington's Appeal, 86 Ib., 512; Worrall's Appeal, 110 Ib., 349; Darlington's Est., 147 Ib., 624.

Strictly speaking, the principle thus invoked applies where the transaction has been consummated by the delivery of the writing in question and the relief asked for is necessarily a reconveyance. But as

a rule of legal policy there is no apparent reason why it should not apply to the question delivery where, as in this instance, that becomes the more obvious question in the case, and the form of relief asked for is cancellation. The entire conduct of the parties to the writing, and especially that of the beneficiary, is so inconsistent with the theory of actual partnership as to negative the inference that it ever existed except on paper. The only apparent purpose of the deeds was to transfer title to the proposed partnership. If none existed the inference of delivery would seem to be further repelled. Under these circumstances the burden of affirmative proof of *bona fide* delivery must be on the son who claims by a deed amounting to a voluntary gift from his father, whose confidential agent he was with respect to the property when the deed was made. He relied upon the presumption arising from the fact that the papers are now in his possession. That presumption is clearly rebutted by the circumstances. Hence, no difficulty is felt in holding that the plaintiff in the bill is not entitled to relief.

The question, if any, is as to the standing of the administrator to sue for the cancellation of the writings. The jurisdiction in that regard is not challenged by the answer to the cross-bill but the question was raised at the argument. If the administrator were proceeding by original and independent bill the question might not be wholly free from difficulty. But having invoked the jurisdiction of equity in the assertion of his right under these papers as against the administrator representing the right of his deceased father, the other party to the instrument, I do not see how the son can question the jurisdiction of the court to give the affirmative relief asked for in the counter suit founded on the same facts constituting the defense to his action. The writings are a cloud on the title which the executor named in the will was directed and empowered to convey. Having accepted the trust on the reunciation of the executor, the administrator *cum test. an.* takes it with the same powers and duties given by the will to the executor.

Lantz v. Boyer, 81 Pa., 325.

The presence of the deeds on the record and the assertion of title thereunder by the son is quite as vexatious a hindrance to the administrator in the performance of its duties as it would be to the legal

owner in offering the property for sale. The effect of the will is to vest a qualified title together with the right of possession in this administrator, for it could maintain ejectment for the lands: *Clark v. Nesbitt*, 1 Penny, 483.

But it is not consistent with the purposes of equity that, having the parties and subject matter wholly within its grasp, it should stop short of a decree that will put an end to the litigation by cancelling the papers which are its sole foundation and which it feels compelled to pronounce invalid. The power of equity in general to decree cancellation of a contract when it is ended cannot be doubted:

Wilson v. Getty, 57 Pa., 266.

Slegel v. Lauer, 148 Ib., 236.

The power will be exercised whenever the writing constitutes a cloud on plaintiff's title and he has no immediate and adequate remedy at law; and while as a general rule such bill can only be maintained by a party in possession it is not so where his title is equitable rather than legal: *Slegel v. Lauer*, *supra*, and cases there cited.

Granting that the administrator can, under the terms of the will, maintain ejectment if he is excluded from possession, why should it be relegated to its action? The prevention of multiplicity of suits is a distinct and valuable head of equity jurisdiction: *Campbell's Appeal*, 80 Pa., 298.

An ejectment would involve merely a retrial of the same questions at issue here. There is no apparent defect of jurisdiction under the pleadings nor other reason why the whole subject of controversy should not now be determined and the litigation ended in one contest.

An oral contract to cut the timber off a tract of land as fast as it is needed by the owner's mill is held, in *White v. Fitts*, 102 Me. 240, 66 Atl. 533, 15 L.R.A. (N. S.) 313, to be void under the statute of frauds, although all the wood might be cut off within a year, where the mill running in its ordinary capacity would require three or four years to work it up. The other authorities on effect of statute of frauds upon parol contracts for services which may, but are not intended to, be performed within a year, are reviewed in a note to this case.

In the Court of Common Pleas of Lackawanna County

No. 30 September Term, 1908.

In Equity.

*Grover C. Sears vs. The Scranton Trust Company, Administrator, etc.,
and The Scranton Trust Company, Administrator,
etc. vs. Grover C. Sears, et. al.*

It was the very essence of the son's case to prove an actual partnership with his father.

The mere relation of parent and child would give rise to no presumption against the validity of the gift by a father to his son, if executed.

It was not error to hold that the son stood in such relation of trust with the father as to cast upon the former the burden of proving delivery.

Messrs. Vosburg & Dawson and Mr. Fred W. Lidstone, for plaintiff.

Mr. George D. Taylor, for defendant.

Opinion by Edwards, P. J., January 16, 1909.

The exceptions are filed on behalf of Grover C. Sears. They go only to conclusions either of fact or law, but cover all those adverse to the exceptant. The argument was directed to four general questions as to which he contends the trial judge erred, to wit:

1. In finding that no partnership business was ever undertaken;
2. In holding that the writings on which exceptant founds his title import a gift;
3. In holding that there was such relation of trust between the parties to the writings as would put the burden of proving their delivery on the exceptant.
4. In holding that abandonment of the transaction would operate to re-invest the grantor with title.

As to the question of fact involved in the first specification we are referred to the testimony of Mr. Townsend as showing that "there was some bills signed C. H. Sears & Son at first, but it didn't last long; I don't know why or anything about it." But on the entire examination of the witness on that subject his testimony amounts to this: he *thinks* some bills were at first receipted in that form but is not prepared to say so positively. Even this was only brought out on cross-examination by counsel for the Trust company.

It is to be considered that it was of the very essence of the son's case to prove an actual partnership with his father; that he made no claim that any account had ever been kept in the partnership name; that the partnership, if it ever existed, was of recent date; that the books were available to show the name of every customer having occasion to take receipts; and that the vouchers could have been produced on subpoena. It must be so considered together with the natural presumption that the evidence would have been deemed of such advantage to his case as to impel their production on his behalf. In the absence of any showing on that score, the finding asked for could not be predicated on the uncertain impression of the witness referred to. How can a chancellor be asked to positively find a fact, the existence of which the witness will not positively assert? True, his testimony like that of other witnesses connects the son with the milling operations, but in a way that in itself is always consistent with the inference of his agency under the father; and in the light of his unmistakable acts that inference becomes irresistible, to the exclusion of any other.

As to the voluntary character of the transaction evidenced by the writings, it is not meant to hold that on its face it was without formal consideration, but that in any substantial sense the writings import a gift. How can it be otherwise? The son neither paid, nor undertook to pay a farthing; the father neither required nor expected it; but, without money and without price, he executed papers which would have transferred to the son property of no small value. It would be trifling with the merits of the case to say that can be regarded otherwise than evincing an intention on the one hand to confer, and, on the other, to accept the benefit of a gift. As regards what the son was to get, the situation was that of a father proposing to donate the entire capital with which the son was to go in business for himself. Nor is that to the prejudice of the son's case. The mere relation of parent and child would give rise to no presumption against the validity of a gift by a father to his son, if executed. For that proposition, reference is made to authorities presently to be noticed.

But whether technically a gift or not, can make no practical difference with the result here, as will be considered in connection with

the next question, viz., Was it error to hold that the son stood in such relation of trust with the father as to cast upon the former the burden of proving delivery? The argument in the affirmative is based upon the supposed authority of two cases in particular: *Clark vs. Clark*, 174 Pa., 309, and *Wendt's Est.*, 14, Pa. Sup. Ct., 644. The attempt is to bring the present transaction within the doctrine of these cases, because the son, and not the father, was the beneficiary. It is enough to say that neither these cases nor any of their predecessors in line of their authority, intimate such doctrine where a specific relation of trust, like that of principal and agent, is to be dealt with; but restrict it to cases resting upon the mere relation of parent and child.

Where a conventional trust exists it is believed that the burden of proof is always on an agent who takes title to his principal's property, where the transfer has been consummated. There is exactly the same reason why he should have the burden of fairly accounting for his possession of the title papers where extrinsic evidence of consummation is wanting, and the actual delivery of the papers is open to serious question. It thus becomes apparent that whether the transaction here was technically a gift or not, is immaterial. The difference with respect to the proof of delivery as between this grantee and another, who might have been a stranger to the grantor, arises from his status as an agent. But had he been a stranger, and the parties dealing at arm's length, the strength of his case would still be that of a presumption of fact. He had possession of the papers, of which the deeds had been recorded after the grantor's death. There were circumstances tending to rebut the presumption that he got them by delivery. That raised a question of fact for the trial judge. It was the exceptant's privilege to make affirmative proof in his own behalf if any existed. Not choosing to do that, the question was submitted at the risk of the fact being found against him, and it was so found. It is now claimed that the testimony of Mr. Nichols shows delivery of the deeds because it traces them at some time to the hands of Mr. Lidstone. But that, unexplained, doesn't help the claimant. It doesn't appear when the deeds were seen in his hands. It may have been since the grantor's death. Nor does it appear how they came to be there. Mr. Lidstone had acted in the matter as attorney for the

grantor. When the latter executed the first deed there was evidently something in his mind not entirely consistent with the purpose of present delivery. What he said then about recording, coupled with the fact that the deeds were not recorded in his lifetime, cannot be disregarded in this case. He may have delivered them to his attorney for the benefit of the grantee. But that doesn't appear. It cannot be so presumed and there is no evidence from which it can be so inferred in this controversy. If it be assumed that the papers were put in his attorneys hands by Mr. Sears, it is quite as probable that it was only for custody because, for some reason he did not see fit to deliver them. On the whole evidence the circumstance-referred to, if anything, tends to repel rather than support the presumption of delivery. The conduct of the parties is inconsistent with the theory of a *bona fide* transfer perfected by delivery of the papers, whether their confidential relation be considered or not.

That relation, however, cannot be disregarded. In the circumstances of this case to hold that the burden of making out his right by affirmative proof of delivery of the title papers, is not on the son, would be to disregard a settled rule, the sound policy of which could hardly find better illustration than in this instance. The fact that, instead of exercising the right of a surviving partner in the premises, he brought this action is not easily reconcilable with his own honest belief that any partnership ever in fact existed between him and his deceased father, and that he had any right thereunder to the property in dispute.

Finally it is said there was error on the subject of abandonment. Both the oral argument and brief of the learned counsel assumed it to have been held that title to the property re-vested in the grantor by reason of abandonment. While there is no doubt that the interest of one partner in the assets may pass to his co-partner by abandonment, that is not what was held or even considered here. The assumption is mistaken, though it is not apparent how the mistake could arise. It was distinctly found that the proposed partnership was never consummated and that by mutual consent the proposal was abandoned. As matter of law it was held that the evidence only warranted such finding, and not the finding that a co-partnership ever existed. Any

question, therefore, of abandonment of chattels is irrelevant, the title of the deceased never having been divested.

This disposes of the only questions discussed or pressed for consideration at bar. It is believed that the case is with the administrator and that there is no reason to disturb or modify the decree *nisi*. The exceptions are dismissed.

Let a formal decree be submitted by counsel *sec. reg.*

That one is not bound by a mere promise to pay the debt of another, unless the promise be in writing, signed by the promising party, is held, in *Mankin v. Jones* (W. Va.) 60 S. E. 248, 15 L.R.A. (N.S.) 214.

The right to recover damages for mental suffering for nondelivery of a telegram in time to enable the sendee to attend the funeral of one to whom he was about to be married, to whom he was not in the slightest degree related, is denied in *Randall v. Western U. Tele. Co.* 32 Ky. L. Rep. 859, 107 S. W. 235, 15 L.R.A. (N. S.) 277.

The discharge of a jury in a criminal case on Sunday, if unlawful and thereby equivalent to an acquittal, is held, in *Hovey v. Sheffner* (Wyo.) 93 Pac. 305, 15 L.R.A. (N. S.) 227, not to entitle the defendant, afterwards committed on a judicial daps for further trial, to discharge on habeas corpus, since the unlawful discharge of the jury is held not to divest the trial court, where the question of former jeopardy must be determined, of jurisdiction.

Permitting the state in a criminal prosecution to ask a question of a witness who is so ill that the court thinks it would be inhuman to subject him to examination, and whose physician states that examination might result fatally, is held, in *Wray v. State* (Ala.) 45 So. 697, 15 L. R.A. (N. S.) 493, to deprive the accused of the constitutional right to be confronted by the witnesses against him, although the right of cross-examination is not expressly denied, since the risk of terminating the witness's life cannot be imposed upon the accused as a condition of the exercise of his right.

In the Court of Quarter Sessions of Lackawanna County

No. 188 February Sessions, 1909.

*Sur Petition of Taxpayers for Leave to Submit Proposed Change to a
Vote.*

*In Re: Changing the System of Taxation for Road Purposes in
Benton Township.*

In accordance with the act of 12th of April, 1906, P. L. 142, the electors of a township adopted the system of money taxation for public roads. Subsequently a petition was presented to court for leave to submit at the next election the question of changing again to the former system, known as the work tax.

Held: The right given to townships is to "change" the system. As such it must be taken to govern the sense in which "abolish" is used in the subordinate clause where it occurs. The order will, therefore, be granted as prayed for.

Mr. Clarence Balentine, for petitioners.

Opinion by Newcomb, A. L. J., January 12, 1909.

At the spring election of 1906, by a vote of the electors, the township adopted the system of money taxation for public roads in accordance with the Act of 12th April, 1905, P. L. 142. The petition now is for leave to submit at the next election the question of changing again to the former system, known as the work tax. It is alleged that the present system has proved less satisfactory than the old one. A question is thus raised as to the scope of the statute not heretofore considered by the courts, so far as we are advised. In its practical effect the question is whether the action of the electors changing the method of taxation in 1906 is a finality, and not open to rescission by a subsequent election, in the absence of specific provision therefor in the statute.

All the act has to say one way or the other in conferring the right to vote, is on the subject of "changing" the system of taxation. It is in small compass, as follows:

"That any township may, by a majority vote of the electors thereof, at the February municipal election, after thirty days prior notice thereof, change the system of taxation for working the public road." Its further provisions on the subject relate only to the procedure by which the right to vote is to be exercised, to the rights of a township and the

duties of road supervisors in cases where the work tax has "been abolished." It is the significance of the phrase, "shall have been abolished," in this connection which gives rise to the question presented here.

. At first blush it conveys the sense of permanency and suggests the idea of an irrevocable change when the money tax is once adopted. Other than this there is no expression in the act to indicate such limitation on the right conferred. True, it could have distinctly provided that as between two different systems of taxation for public roads the townships might, each year, or at such other intervals as the legislature saw fit to designate, make choice by a majority vote of the electors. That, doubtless, would have given the right of local option. And, considering in all its aspects the subject matter of the act as it is, there can hardly be a doubt that its dominant purpose was local option. It must be so construed as not to defect, but to effectuate its purpose. It may well be that one set of electors would entertain very different views in the premises from those of their predecessors. There is no reason consistent with the principle of local option why they should not have the same right to choice, nor, indeed, why the same set of electors, on a change of sentiment arising from experience, should not have the right to say so in a matter of purely local responsibility. All innovations are experimental. In this instance it is claimed to have proven unsatisfactory as compared with the old method. The same might be true where the change was the other way, as in cases where the roads were being maintained with a money tax under special laws not affected by section 16 of this act. In such case there would not be the same ground for supposing the change, once made, to be final; because it is only the work tax that is referred to as abolished by an affirmative vote. Therefore, as between the two cases, in exercising their right to vote, the interested parties would stand on unequal ground. A construction involving such result is not to be favored.

In the operative words of the grant neither "abolish" nor any equivalent is used. The right given to the townships is to "change" the system—a term of much less restricted meaning in its ordinary import. As such it must be taken to govern the sense in which

"abolish" is used in the subordinate clause where it occurs. Had the intention been to make an affirmative vote final in any instance, it would have been not only highly appropriate but very easy for the legislature to say so unmistakably. We cannot think such intention is to be gathered from what it did say. The order will, therefore, be granted as prayed for.

Where the owner of a note secured by real-estate mortgage assigned both instruments, and guaranteed the payment of interest when due and the payment of the principal of the note twelve months after maturity, and, before the statute of limitations had run against the guaranty, the guarantor subsequently purchased the land at tax sale and assigned the certificate, which was void on its face, to another, it was held, in *Cones v. Gibson* (Kan.) 94 Pac. 998, 16 L.R.A. (N. S.) 121, in an action brought to foreclose the mortgage after the statute had barred the remedy upon the guaranty, that the purchase of the land at tax sale by the guarantor did not effect a payment of the taxes; that the guarantor and his assignee were under no obligation to pay the taxes on the land, and that the tax-deed holder was entitled to a first lien.

The fact that the brand of fuse supplied by a mining company for the use of its miners is in general use and favorably known is held, in *Wijta v. Interstate Iron Co.* 103 Minn. 303, 115 N. W. 169, 16 L.R.A. (N. S.) 128, not to be conclusive evidence that the company is not guilty of negligence in furnishing that particular kind of fuse; but it is also held that the fact that a better and safer kind has been introduced within recent years, and has come into common use, is not conclusive evidence that the company is negligent in using the older kind, both facts being held simply evidence for the consideration of the jury.

Mill owners, in order to comply with the statute requiring the safe-guarding of machinery, are held, in *Barclay v. Puget Sound Lumber Co.* (Wash.) 93 Pac. 430, 16 L.R.A. (N. S.) 140, to bound to adopt such guards as reasonable prudence, observation, and care suggest, regardless of the question whether other mill owners use them.

In the Orphans' Court of Lackawanna County.

No. Year

*Exceptions to Confirmation of Sale.**In Re: The Estate of Julia Terppe, Deceased.*

Orphans' Court sales depend upon the approval and confirmation of the court for their validity. If the purchaser has a complaint he should make it to the court before confirmation.

When property is given to a person for for life, and there is annexed to such gift a power of disposition of the reversion by the will, such person takes but the limited estate expressly given, with a super-added power of disposition of the remainder.

The donee of a power of appointment may either in express terms or by implication render the estate over which she has the power, assets for the payment of her debts.

Mr. R. L. Levy, for exceptant.

Messrs. John F. Scragg and John F. Murphy, contra.

Opinion by Sando, P. J., January 20, 1909.

The property was sold, pursuant to an order of court made on the 23d day of September, 1908, which order was obtained upon a petition filed by the executor, wherein it was stated, inter alia, that Julia Terppe died "seized * * * * as of fee" of the real estate; and, prayed for the order to sell the same for the payment of debts.

The interest of Julia Terppe in the real estate was acquired by will from her deceased husband, Frederick L. Terppe, and all the interest which Julia Terppe had in the real estate was such as she received under her husband's will.

The sale was appointed for the 29th day of October, 1908, when the exceptant became the highest bidder. Before the return the purchaser filed exceptions. The exceptions filed to the confirmation of the return of the real estate sold as the property of Julia Terppe, deceased, by the executor, raises the principal question, whether the court was without jurisdiction to order the sale for the payment of the decedent's debts.

Judicial sales should be so conducted as not to mislead or entrap bidders. Notwithstanding the maxim caveat emptor is applicable to such sales, it is the duty of those conducting them to act in good faith, avoiding as far as possible any misrepresentation or misdescription: Schug's Appeal, 19 W. N. C. 49.

A sale by order of the Orphans' Court is not complete until confirmation. The court retains entire control over the sale until, and even after, confirmation, and may or may not confirm it, according to its sense of justice in the particular case: *Demmy's Appeal*, 43 Pa., 155.

In *Fox vs. Meusch*, 3 W. & S., at page 446 Mr. Justice Sergeant uses this language: "If the purchaser has a complaint, he ought to make it to the Orphans' Court before confirmation." In the present case application for relief was made to the Orphans' Court, which had ordered the sale, before the sale was confirmed, and while the whole matter is yet within control of the Court.

Frederick L. Terppe died in 1905. His will dated October 16th, 1896, probated July 15, 1905; contains inter alia, the following:

"Third. I give, devise and bequeath unto my beloved wife, Julia Terppe, all the rest, residue and remainder of my property, real, personal or mixed, wherever or however situated or located at the time of my death, she to have, hold, use and enjoy the same and all the income therefrom, less taxes and charges thereon, for and during the term and period of her natural life, and further as to the remainder and fee simple of said property, I give, devise and bequeath to said beloved wife, Julia, the sole right and I so direct, of disposing of said property by her last will and testament, to whomsoever and howsoever and upon such terms and conditions as to her shall seem best at time of making her will.

Fourth. Should my said wife, Julia, neglect or refuse to dispose of the remainder of said property by her last will and testament, in that event I give, devise and bequeath the same absolutely in fee simple to my beloved adopted son, William Frederick Terppe."

Julia Terppe died on October 25th, 1907. She made a will dated February 3d, 1906, the material portions of which are as follows:

"2. I direct that all legal debts owing by my estate be paid by executors hereinafter named." * * *

"10. I give, devise and bequeath to Miss Lizzie Terppe, of Philadelphia, Pa., * * *; and in addition thereto I give, devise and bequeath to her the sum of \$3,000, to be paid from my estate, whether real, personal or mixed." * * *

"11. To my beloved son, Frederick William Terppe, the adopted

son of my late husband, Frederick L. Terppe, I give, devise and bequeath all the rest, residue and remainder of my property, real, personal and mixed, located and situated wheresoever or howsoever the same may be at the time of my decease, and subject to the above devises and legacies, he to have, hold, use and enjoy the same absolutely for himself, his heirs and assigns, in fee simple forever. But suggesting in this connection in the way of advisement to him, that it is my wish in accepting the said real estate he shall continue to conduct the drug business as now conducted on the property left me by my late husband, Frederick L. Terppe, for and during at least the period of ten years from the date of my decease, and that during this period of time he shall pay whatever encumbrances may be left by me against the said estate, either by reason of liens against the same owing by me at the time of my death or by reason of the legacies and devises herein granted to other persons to be paid therefrom, and he shall not dispose of the said estate in any manner but conduct it in a way of business until such debts are all paid off and the property clear."

In *Jackson vs. Robins*, 16 Johns, (N. Y.), 537, 588; Chancellor Kent said: "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is, where the testator gives an estate for life only by certain and express words, and annexes to it a power of disposal in that particular, and special case, the devisee for life will not take an estate in fee."

If a testator devises an estate which is clearly a life estate, and adds to such devise limited powers of disposition and alienation, the authorities are nearly unanimous in holding that such a power of disposition does not enlarge the life estate into a fee, but that the estate created is exactly what it purports to be; that is to say, a life interest with power to testator under certain conditions and in certain methods to dispose of the fee: Page on Wills, Sec. 576, p. 669. This is a concise statement of the rule of construction governing the will of Frederick L. Terppe, in which the title of Julia Terppe arises, and it is the rule in Pennsylvania which controls in this case.

When property is given in the first instance to a person for life or other limited estate, and there is annexed to such a gift a power of

disposition of the reversion either by will or by deed, such person takes but the limited estate expressly given, with a super-added power of disposition of the reversion: 22 Am. & Eng. Ency. of Law (2d Ed.) p. 1097.

It was the manifest intention of Frederick L. Terppe to give his wife a life-estate in the land, and a general power of disposition over the inheritance. His object was to make provision for her by giving her the usufruct of the property; and also to enable her to transfer the fee to such persons as she might consider the proper objects of her bounty. He first carved out a life-estate in her favor, and then gave her authority to dispose of the remainder. This is the only construction that can be put upon the will, which will give full effect to the language used by the testator. A construction that the fee passed to the devisee would render inoperative the expressions "for and during the term and period of her natural life" and "the sole right and I so direct, of disposing of said property by her last will and testament, to whomsoever and howsoever and upon such terms and conditions as to her shall seem best." The first of these clauses was inserted to describe and qualify the estate devised; and the last to confer the power to dispose of the inheritance. If the devisee died without a proper execution of this power, the estate under the "fourth" item in the testator's will passed to William Frederick Terppe.

We think that the will of Frederick L. Terppe must be construed as giving the widow a life-estate with power of disposal, and not a fee simple. The controlling consideration is that the language of the will itself, limits the interest of Julia Terppe to a life-estate with power of disposal and does not give her absolute ownership.

A technical power of disposal, of the very substance of the testator's estate, without any limitation as to the manner or kind of disposal, is given by Frederick L. Terppe to his widow. The creation of the life-estate controls the operation of the power and prevents it from enlarging the estate to a fee. Nothing passes under the clause conferring the power until the power itself is exercised.

The terms of the limitation of Julia Terppe's estate, "during the term and period of her natural life" describes an estate which terminated at her death; and the words which follow as to the remainder and

fee simple of the property "the sole right, and I so direct, of disposing of said property by her last will and testament, to whomsoever and howsoever and upon such terms and conditions as to her shall seem best" are appropriate to create a general power of appointment or designation.

In case of a general power of appointment by will, the donee may appoint for the benefit of his estate so as to subject the property to liability for the payment of his debts: 22 Am. & Eng. Ency. of Law (2d ed.) 1134.

When the donee of a general power of appointment by will discloses his intention to blend the appointed property with his own as by directing his debts to be paid out of the appointed property, the appointed property becomes part of his estate, and is properly administered by his executor: 16 Pep. & Lewis Dig. of Dec. Col. 28082.

If Julia Terppe had a general power of appointment, then the estate is liable for her debts, for she directs in item "2" of her will "that all legal debts owing by my estate be paid." Such is our conclusion.

Now January, 20th, 1909, the exceptions to the confirmation of sale are dismissed.

A bond to pay all damages sustained by the issuance of an injunction is held in *Littleton v. Burgess* (Wyo.) 91 Pac. 832, 16 L.R.A. (N. S.) 49, properly to include attorneys' fees necessary to secure its dissolution. With this case is a note reviewing the other authorities on Recovery, upon injunction bond, of attorneys' fees necessarily expended in dissolving the injunction.

An insurer whose general agent, with power to waive in writing a provision in the policy against the installation on the premises of a gas generating plant, a few weeks after issuing policies containing such clause to the owner of a building, waives the provision in favor of his tenant, who installs such plant without the knowledge of the landlord, is held, in *German American Ins. Co. v. Hymen* (Colo.) 94 Pac. 27, 16 L. R. A. (N. S.) 77, to have waived the provision in favor of the landlord also, unless it notifies him of the installation, and either requests him to apply for a waiver, or cancels his policy.

In the Court of Common Pleas of Lackawanna County, No. 633, January Term, 1908.

Rule for a New Trial.

William T. Hackett vs. Belle L. Arnold.

It is not necessary that a real estate broker actually consummate a sale. His commissions are earned when he finds a purchaser who is willing to pay the price that the seller asks, and if he brings the parties together and they come to an agreement, the one to sell and the other to buy, then his commissions are earned, even though the sale, for some reason, should fall through.

Mr. W. W. Lathrope, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

The plaintiff, a real estate agent, brought this action to recover commissions for selling the defendant's property. The basis of his claim is a writing signed by the defendant, dated January 8, 1907, authorizing the plaintiff to negotiate the sale of a lot therein designated, for the price of \$13,000. It contained the following clause: "It is further agreed that if any of the parties who consider this property while this agreement is in force—purchase the same, then the said W. T. Hackett is to receive a commission of two and a half per cent. of the purchase price." It also provided: "This agreement good for three months from date hereof and thereafter until cancelled in writing on thirty days' notice."

About March 10, 1908, the defendant gave the plaintiff notice in writing that the agreement would terminate in thirty days. On May 15, 1908, more than a month after the termination of the agreement, the defendant sold the property to Simon Dorfman for \$11,500.

The plaintiff had carried on some negotiations with Dorfman while the property was in his hands for sale; Dorfman made an offer of \$11,000, which plaintiff submitted to the defendant, but she refused to accept it, and the matter was dropped. After the termination of the agreement between plaintiff and defendant the latter advertised the property for sale in a newspaper. Dorfman testified that this advertisement was called to his attention by members of his family, and that by reason thereof he called upon the defendant at her home and made a deal with and purchased the property from her, entirely independent of his previous negotiations with the plaintiff.

Plaintiff's counsel presented the following point: "The paragraph in the written agreement offered in evidence which reads, 'It is further agreed that if any of the parties who consider this property while this agreement is in force, purchase the same, then the said W. T. Hackett is to receive a commission of two and a half per cent. of the purchase price, to be paid out of the first moneys received on said sale,' is to be construed as meaning that if any one should consider the property while said agreement was in force, to wit., during three months from January 8, 1907, should purchase it, even though he purchased it after the expiration of the said three months, then the said Hackett was to receive a commission of two and a half per cent. of the purchase price."

This was answered as follows: "This is affirmed if you find that the sale was made as a result of the negotiations or efforts made by Mr. Hackett while the property was in his hands for sale."

The jury was also instructed in the general charge: "The construction of this paper is for the court, and in my judgment that clause means that if any person who considers the property while it is in the hands of Mr. Hackett purchases the property as the result of that consideration, or as the result of the efforts of Mr. Hackett to make the sale, then Mr. Hackett would be entitled to his commission. I think that is the meaning of that provision in the contract. I do not think that it was meant by that, that if a person should purchase it sometime after the expiration of the contract and entirely independent of anything done by Mr. Hackett, that in that event it was intended that he should have his commission, but that it does mean, as I construe it, that it must be by reason of something that he does to bring about the sale." * * * "If you find that the negotiations were suspended for a time, but that the sale was finally made as a result of his efforts, of the negotiations that he had with Mr. Dorfman, then I should say you would be justified, and it would be your duty to find a verdict for the plaintiff for the amount which he claims." * * * "It is claimed on his behalf that the sale was postponed, the consummation of the sale was postponed, perhaps for the purpose of beating him out of his commissions. That is a question for you to consider under the evidence, and if, as I have said, you find that that was done, that the sale was the result of his efforts, and while it was not actually consummated and the deed delivered until a month or a little more after the property

was taken out of his hands, yet if he actually by his efforts brought about the sale, then he would be entitled to his commissions."

We also said to the jury: "It is not necessary that a real estate broker actually consummate a sale, his commissions are earned when he finds a purchaser who is willing to pay the price that the seller asks, and if he brings the parties together and they come to an agreement, the one to sell and the other to buy, then his commissions are earned, even though the sale, for some reason, should fall through."

We think the plaintiff got all he was entitled to from the court; there was little more than a bare suspicion upon which the jury could have found in his favor, which in view of the positive testimony against him was not to be expected.

The rule for a new trial is discharged.

Possession gained by a mortgagee as tenant of the mortgaged property under a lease requiring a surrender at the expiration of the term is held, in *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75, 16 L.R.A. (N. S.) 151, not to be such possession with consent of the mortgagor under the mortgage as will entitle him to retain possession until the mortgage is paid.

Defendant, who, after a special appearance to contest the jurisdiction because of inefficient service of the summons, submits to a trial upon the merits, is held, in *Corbett v. Physicians's Casualty Asso. (Wis.)* 115 N. W. 365, 16 L.R.A. (N. S.) 177, to waive the question of the jurisdiction of the court over his person.

A grant of an easement of way, with no mention of light and air, is held, in *Bitello v. Lipson*, 80 Conn. 407, 60 Atl. 21, 16 L.A.R. (N. S.) 193, not to prevent the owner of the fee from interfering with the light and air by placing structures over the way in such a manner as not to interfere with its reasonable and ordinary use.

In the Court of Common Pleas of Lackawanna County, No. 41, September Term, 1908.

Certiorari.

Charles A. Judge vs. H. W. Johnson.

Reasonable certainty is all that can be expected or required of an alderman in the statement of a claim. Technical precision is not required.

Mr. R. J. Manning, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Newcomb, A. L. J., January 4, 1909.

The amount involved here is only \$5.30, but the question raised is not entirely without interest. The action is assumpsit and is founded upon the covenants in a lease between the parties under which defendant was tenant to the plaintiff for a term expiring March 31, 1908. The demised premises was a dwelling house. As stated in the record the plaintiff's claim consists of two items, viz., "\$2.80 due him from the defendant for rent and \$2.50 due him from defendant for damages done to two windows by the defendant under the provisions of a written lease in which the plaintiff is lessor and the defendant is lessee, dated April 1, 1907," etc., etc., setting out the material covenants. The one on which the case turns is that lessee will "leave the premises at the end of the term in as good condition as found, except ordinary wear and tear, fire, wind, flood and unavoidable casualties."

Suit was brought soon after the term expired.

It is objected that the attempt was to combine assumpsit for the rent with trespass for damages sounding purely in tort.

If anything like technical precision were required of an alderman in the statement of the claim the objection might not be unwarranted. Reasonable certainty is all that can be expected or required. The fair intendment of the claim for damages as stated on his record is that it was not for a tortious injury to some uncertain property, but for injury arising out of defendant's failure to surrender the demised premises in the condition specified in his lease. That would be a breach of his covenant, for which assumpsit would be the appropriate remedy. The measure of damages would be the cost of making such repairs as

would restore the property to the condition called for by his contract
Darlington vs. DeWald, 194 Pa., 305.

There is nothing here to indicate that any other measure was applied. As both claims arise out of the same contract they are properly joined.

The judgment is affirmed.

One who, in consideration of an advance of goods and a subordination of his claim against the other contracting party to those of other creditors, obtains a right to a mortgage on real estate, which he subsequently foregoes on receiving a promise of a mortgage on land to be obtained in exchange for it, and then permits another exchange upon a similar promise, after which he receives a mortgage on the land finally obtained by his debtor, without notice of any weakness in the title, is held, in *Richardson v. Wren* (Ariz.) 95 Pac. 124, 16 L.R.A. (N. S.) 190, to be entitled to priority over the rights of the former owner of the mortgaged land, to rescind the trade for fraud.

The right of a labor union to notify customers not to deal with a person whom it has put on the unfair list is denied in *Hey v. Wilson*, 232 Ill. 389, 83 N. E. 928, 16 L.R.A. (N. S.) 85, although no threat accompanies the notice, if the persons receiving it understand that injury will result to those failing to comply with it.

In case of the remarriage of a woman whose husband had not been heard from for three years, it is held in *Smith v. Fuller* (Iowa) 115 N. W. 912, 16 L.R.A. (N. S.) 98, that the presumption of innocence will overcome the presumption of his continued life.

When the homestead has once attached to land, it is held, in *Weaver v. First Nat. Bank*, 76 Kan. 540, 94 Pac. 273, 16 L.R.A. (N. S.) 110, that it may persist for the benefit of a single individual who is the sole surviving member of the family.

In the Court of Common Pleas of Lackawanna County, No. 381, November Term, 1908.

Exceptions to Affidavit of Defense and Rule for Judgment.

Thomas P. Gordon vs. Philemna or Philomena Riccardo and Salvatore Riccardo.

As against the plaintiff's rights in the premises, without notice either actual or constructive, the fraud of a stranger to a bond cannot be set up by the maker.

Mr. John F. Murphy, for plaintiff.

Mr. G. M. Okell, for defendants.

Opinion by Newcomb, A. L. J., January 11, 1909.

The plaintiff sues for an alleged breach of defendants' bond. The bond was given under the sheriff's interpleader act of 26th of May, 1897, P. L. 95, and was conditioned accordingly that the "claimant shall at all times maintain her title to the said goods and chattels or pay the value thereof to the party thereunto entitled if the said issue shall not be determined in favor of the claimant." The goods and chattels referred to are mentioned in a schedule attached to the bond, copy of which is set forth in the plaintiff's statement. It is therein averred that the property had been taken in execution at the suit of the plaintiff against one Rocco Riccardo; that the claimant at whose instance the issue was granted was his wife, Philemna or Philomena, defendant herein; that the bond having been approved by the Court she took the goods from the sheriff's custody; that she filed her declaration upon which issue was formally joined *sec. leg.*; but that when the cause was regularly called for trial she suffered a non-suit, to wit: Sept. 19, 1906, in No. 396, September Term, of that year; that thereafter on her petition filed Nov. 9, 1907, the non-suit was taken off; but the case having been again put on the trial list for trial she suffered a second non-suit, to wit: September 28th, 1908, whereby the condition of her bond, on which the other defendant is surety, stands broken.

Prima facie these averments make out plaintiff's right to recover.

Defense is taken separately by the defendants. That of the surety will be first noticed:

Both signatures are by mark. Each is witnessed by two persons, one of whom is the attorney who filed the affidavits. Salvatore doesn't deny the genuineness of his signature. He only says that being unable to read the paper his signature was procured by a fraudulent misrepresentation as to its character, viz., that it was a liquor license bond. But he in no way connects the plaintiff with the alleged deception. He charges that to his brother who was defendant in the execution and is the husband of the claimant in the interpleader, his co-defendant here. He doesn't deny that the bond was used in her behalf as in the plaintiff's statement alleged. Neither does he attempt to show anything tending to affect the plaintiff with notice of the alleged misrepresentation. As against the plaintiff's rights in the premises, without notice either actual or constructive, the fraud of a stranger to the bond cannot be set up by the maker. No authority need be cited for this conclusion.

The other defendant merely says: "I deny that I either signed the interpleader bond mentioned in plaintiff's statement or authorized any one for me to sign my name either by mark or otherwise."

No attempt is made to controvert the allegation that she made claim to the property under levy; that by means of the bond she produced its release; that she availed herself of all the benefits of the interpleader act with respect to the issue awarded at her instance in order that she might respect to the issue awarded at her instance in order that she might show her title; and that she afterwards reaffirmed the integrity of the proceedings by her petition to take off the non-suit.

Having thus profited by the bond to the plaintiff's prejudice by depriving him of the benefit of his levy, she is now estopped from denying its due execution. If it be admitted that her denial may be technically true, she will still be presumed to have ratified the bond though it was in fact executed in her name by some other person without authority.

The exceptions are sustained and judgment is directed to be entered for plaintiff; the damages to be assessed by the prothonotary at the value of the goods and chattels mentioned in the bond, not to exceed, however, the amount of plaintiff's execution, the lien whereof was released by the filing of the bond, with interest and costs including the costs, if any, taxed in the interpleader proceeding hereinabove referred to.

In the Court of Common Pleas of Lackawanna County.

No. 542, May Term, 1907.

Demurrer to Amended Statement and Abstract of Title.

George F. Barber vs. Martha E. Barber.

Where a husband buys real estate and has the deed made to his wife, the legal presumption is that a gift was intended; and if he subsequently alleges a trust in his favor, he must, in order to rebut the presumption, prove by clear, explicit and unequivocal evidence all the essential requisits of a trust.

The evidence of establishing a resulting trust, especially when arising *ex maleficio*, which is an imputation of fraud, should be clear, explicit and unequivocal. The necessary facts must not only be shown, but must also be averred in the pleadings.

The plain meaning of the act of April 22, 1856 is, that a trust in land can now be proved in no other way than by writing. The proviso to the act excepts from its operation resulting trusts, such as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired.

Subsequent fraud no more raises a trust than does subsequent payment of the purchase money.—*Barnet vs. Dougherty*, 32 Pa., 371. This case has been so consistently followed, and so frequently cited, that a mere reference to it is sufficient to show the state of the law at the present time.

A trust cannot be established by parol evidence that a grantee in an absolute deed agreed orally to hold the property conveyed upon certain trusts, where it is not shown that the grantee, by means of fraud, artifice, solicitation or persuasion, induced execution of the deed.

Parol evidence of conversations and negotiations may be shown to prove a fraud or trust, but they should be accompanied with clear evidence that the arrangement continued the same up to the time of the execution of the writing.

An action of ejectment brought by one in possession is an anomaly. It is a possessory action; designed to redress no other wrong than that of holding the true owner out of possession, and it cannot be maintained for land for which the plaintiff is himself in possession.

Messrs. Houck & Benjamin and Messrs. R. H. Patterson and I. H. Burns, for plaintiff.

Messrs. S. B. Price and E. W. Thayer, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

The objection raised by the demurrer to plaintiff's amended statement is, that it alleges an express trust which is not in writing and is, therefore, insufficient.

It is enacted by the fourth section of the act of 22d April, 1856, P. L. 533, that: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments there of shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void; provided,

that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as if this act had not been passed."

The first averment in the declaration is, that the plaintiff purchased the land and paid the purchase money, and had the conveyance made to his attorney, W. Gaylord Thomas, upon his promise to hold the title as trustee, and convey to such person as the plaintiff should indicate; that, in pursuance thereof, Mr. Thomas, with the consent of the plaintiff, did convey to Martha E. Barber, who is the plaintiff's wife, and defendant in this case.

This averment, if true, undoubtedly gave rise to a resulting trust in favor of the plaintiff, as against Thomas; but the trust was executed by the conveyance to Martha E. Barber, and requires no further attention.

The next averment, referring to the conveyance from Thomas to Mrs. Barber, is as follows: "It having been agreed between the parties to said deed and the plaintiff, that Martha E. Barber should hold said title to said lot in the same manner and for the same purposes as said title has been previously held by the said W. Gaylord Thomas; that the said Martha E. Barber consented to said agreement and arrangement, and the plaintiff was induced by such consent and agreement to direct and allow the said W. Gaylord Thomas and wife to execute and deliver said deed of March 13, 1885, to said Martha E. Barber."

Whether this averment is sufficient to give rise to a trust in favor of the plaintiff as against his wife is a question raised by the demurrer. Where a husband buys real estate and has the deed made to his wife, the legal presumption is that a gift was intended; and if he subsequently alleges a trust in his favor, he must, in order to rebut the presumption, prove by clear, explicit and unequivocal evidence, all the essential requisites of a trust. *Earnest's Appeal*, 106 Pa., 310.

The evidence to establish a resulting trust, especially one arising *ex maleficio*, which is an imputation of fraud, should be clear, explicit and unequivocal. *Kimmel v. Smith*, 117 Pa., 183; *Kistler's Appeal*, 73 Pa., 393; *McGinity v. McGinity*, 63 Pa., 38; *Nixon's Appeal*, 63 Pa., 279.

The necessary facts must not only be shown, but must also be averred in the pleadings. *Byers v. Ferne* ; 216 Pa., 233.

In *McCormick v. Cooke*, 199 Pa., 631, the bill was dismissed on demurrer for failure to set up such essential grounds for relief.

Martha E. Barber took the title with plaintiff's consent, and by his direction, and hence with his approval of the vesting in her absolutely of the title by the deed of W. Gaylord Thomas. She, therefore, held the land divested of any trust, unless it be one raised by a parol agreement. But the plain meaning of the act of April 22, 1856, is, that a trust in land can now be proved in no other way than by writing. The proviso to the act excepts from its operation resulting trusts, such as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. Subsequent fraud no more raises a trust than does subsequent payment of the purchase money. *Barnet v. Dougherty*, 32 Pa., 371. This case has been so consistently followed, and so frequently cited, that a mere reference to it is sufficient to show the state of the law at the present time.

As between the plaintiff and the defendant, unless some fraud was practiced by her at the time of the conveyance to her, by which she acquired the title to the property, the law will not declare her a trustee for the benefit of the plaintiff. But no fraud on her part is alleged. No misrepresentation, no management of any kind is averred in the declaration. It is, indeed, averred that the time of the conveyance to her it was agreed between the parties to the deed and the plaintiff, that Martha E. Barber should hold the title in the same manner and for the same purposes as said title had been previously held by W. Gaylord Thomas; that is to say, that she would hold the title as trustee for the plaintiff, and would convey title to whom the plaintiff should indicate, and at such time as he might desire. And it is further averred that the said Martha E. Barber consented to said agreement and arrangement, and the plaintiff was induced by such consent and agreement to direct and allow said W. Gaylord Thomas and wife to execute and deliver said deed of March 13, 1885, to said Martha E. Barber. This is a mere conclusion and is wholly unsupported by the allegation of any such facts or circumstances as are necessary to give rise to a trust *ex maleficio*.

It was said by Rice, P. J., in *Simon's Estate*, 20 Pa. Sueprior Ct., 450: "It is to be borne in mind, that the first suggestion of the transfer was made by John Simon, (the grantor), himself * * * * Whether the transfer was first suggested by him or by his sister, (the grantee), was a question of the highest importance. * * * * The fact that the transfer was made upon his own suggestion, and without any undue influence, persuasion, or misrepresentation on the part of the grantee, we think is established by the testimony. There is no finding by the auditing judge that he was deceived or mislead as to the contents of the deed which he signed, or, even, that it differed in form from what he intended it to be. We do not see how it can be said that she procured the deed by fraud. Her fraud upon him, if there was a fraud, consists in the breach of her parol promise. But this, according to the doctrine of well considered cases, two of these quite recent, is not sufficient to make her a trustee ex maleficio." He cites in support of this doctrine *Kellum v. Smith*, 33 Pa., 158; *Barry v. Hill*, 166 Pa., 344; *Braun v. First German Church*, 198 Pa., 152; and *Martin v. Baird*, 175 Pa., 540. Many other cases to the same effect might be cited.

In *Grove v. Kase*, 195 Pa., 325, Judge McPherson in disposing of a bill in equity for a reconveyance, found as a fact: "That the defendant was not guilty of fraud in obtaining the deed; that she made no false representation, concealed no important fact, and made no promise or agreement (other than the agreement to reconvey), in order to induce the plaintiff to execute the deed in question." From this he drew the legal conclusion that: "This finding of fact, in connection with the rule of law just referred to, is conclusive against the plaintiff's right, for the agreement to reconvey would not, without proof of fraud, support the decree now asked."

A trust cannot be established by parol evidence that the grantee in an absolute deed agreed orally to hold the property conveyed upon certain trusts, where it is not shown that the grantee, by means of fraud, artifice, solicitation or persuasion, induced the execution of the deed. *Salter v. Bird*, 103 Pa., 436.

The case last cited is substantially identical with the one in hand and rules it against the plaintiff. There is here not only the absence of any allegation of fraud, artifice, solicitation or persuasion, by the

defendant, which induced the transfer, but such idea is negated by the declaration. This is particularly true as to the conveyance to Babcock, concerning which the plaintiff avers that he "secured one Gardner J. Babcock, who agreed to become trustee to hold the legal title to said lot for the plaintiff as trustee, and to execute and deliver a deed to whom the plaintiff might desire, and the plaintiff agreed and promised for so doing to pay the said Babcock the sum of seventy-five dollars each year" for his services as such trustee. Clearly such an allegation as this is insufficient to give rise to a trust *ex maleficio*. The conveyance was not to serve any purpose so far as the grantee, Babcock, was concerned, and there is no allegation of misrepresentation, fraud or inducement used at the time to procure the conveyance; and this distinguishes this case from those in which a trust *ex maleficio* has been held to arise.

The plaintiff must recover on the strength of his own title. But if he had any interest in the land he conveyed it away when he joined with his wife in the deed to Babcock; which joinder, it may be observed, was not necessary, if she held the title in trust for him; as in that case she could convey his interest without his joining in the deed. *Casciola v. Donatelli*, 218. Pa., 624.

The plaintiff's case is not strengthened by his averment relative to a conveyance to one Dowd, and from Dowd to the defendant. He says that at sometime which he is unable to fix and determine, he, the plaintiff, consulted with his wife and one Dowd concerning the matter of transferring the legal title to said Dowd to hold as trustee; and Dowd promised and agreed with the plaintiff that if such conveyance were made he would hold the title in trust for the plaintiff, and would, at his request, convey the same to whom he should desire. This is followed by the allegation that he, the plaintiff, never authorized or consented to any conveyance by Babcock; but that he was informed shortly before bringing this suit that a deed had been delivered from Babcock to Dowd; and also one from Dowd to the defendant, Martha E. Barber.

The trouble with this averment, in addition to that which is common to all the others, is, that it fixes no time when the proposed arrangement was discussed with Dowd. In *McGinity v. McGinity*, 63 Pa., 38, it was held that parol evidence of conversations and negotia-

tions may be shown to prove a fraud or trust, but they should be accompanied with clear evidence that the arrangement continued the same up to the time of the execution of the writing.

There is another ground which is fatal to plaintiff's case as set forth in his declaration. The sixth section of the act of 22d April, 1856, provides, "that no right of entry shall accrue, or action be maintained, * * * * to enforce any implied or resulting trust as to realty but within five years after such contract was made or such equity or trust accrued, unless such trust shall have been acknowledged by writing to subsist, by the party to be charged therewith, within the said period."

The act is a statute of repose, and does not need to be specially pleaded. It is not to be regarded simply as a statute of limitations, it is a provision for the greater certainty of title. It affects the title to land, and not merely the remedy for its recovery. *Way v. Hooton*, 156 Pa., 8, and the authorities therein cited.

True, the act does not apply to a cestuique trust in possession. Plaintiff avers that he was in possession until 1897; and he apparently attempts to convey the impression that he still is. He says, "that during all the time from and before the 18th day of September, 1884, until the spring of 1897, the plaintiff was in open, notorious and exclusive possession of said lot and lived upon the same continuously; that since the spring of 1897 the plaintiff has lived separate and apart from his wife, the defendant; but during all the time from the spring of 1897 until the present time the plaintiff's wife and family have continued in the occupancy of the said property, and the plaintiff has permitted the defendant to collect the benefits arising from the property for her support and the support of his, the plaintiff's, family. And the defendant now continues to occupy the property, and is the wife of the said George F. Barber, plaintiff herein."

An action of ejectment brought by one in possession is an anomaly. It is a possessory action; designed to redress no other wrong than that of holding the true owner out of possession, and it cannot be maintained for land of which the plaintiff is himself in possession. *Kribbs vs. Downing*, 25 Pa., 399. By bringing ejectment the plaintiff admit that he is out of possession and the defendant is in. This action was brought

April 17, 1907. At what time prior to that date did the plaintiff's possession cease? The only inference which can be drawn from the declaration is, that it ceased in the spring of 1897, since which time, he says, he has lived separate and apart from his wife, and she has been in the occupancy of the property. As this was ten year prior to his bringing this action his right is barred by the lapse of time.

The demurrer is sustained.

A master who, in order to render safe a dressing room for employees through which runs a shaft, incloses it in a box the removal of which is not required in the daily operation of the factory, is held, in *Flynn v. Prince, Collins, & Marston Co.* 198 Mass. 224, 84 N. E. 321, 17 L. R. A. (N.S.) 568, not to be able to delegate to an employee the burden of keeping the box in place.

An injury to the husband through the deprivation of his wife's services or matrimonial companionship because of a personal injury to her is held, in *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N.S.) 570, not to be damages to the person within the meaning of a statute providing that actions for tort for assault "or other damages to the person" shall not abate by death.

An editorial misstatement of the law as stated in a court's written opinion on a matter of wide application and importance is held, in *Re Providence Journal Co.* (R. I.) 68 Atl. 428, 17 L. R. A. (N.S.) 582, to be a contempt of court, although unintentional.

While an attorney has the right to comment upon and criticize the rulings of a judicial officer in an action which has been finally determined, it is held, in *Re Hart*, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N.S.) 585, that he may not insult the judicial officer by words written or spoken, addressed to such officer personally, because of the latter's official act, though in a matter fully ended; and that if he does so it may constitute a sufficient cause for his disbarment.

In the Court of Common Pleas of Lackawanna County.

No. 791, March Term, 1907.

Ejectment.

Exceptions to Report of Referee.

John Pastorik vs. Michael Repash.

No action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed. An ejectment cannot be tried without an issue; nor can a case be referred until "after issue joined."

Messrs. Brennan & Donahoe, for plaintiff.

Messrs. Maxey and Gardiner, for defendant.

Opinion by Edwards, P. J., January 4, 1909.

The act of May 8, 1901, P. L. 142, provides that in actions of ejectment the plaintiff shall file a declaration, which shall consist of a concise statement of his cause of action, with an abstract of the title under which he claims the land in dispute; and that the defendant, in addition to the plea of "not guilty," shall file an answer setting forth his grounds of defense with an abstract of the title by which he claims. The act further provides "that no action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed."

In the case now before us the plaintiff filed his declaration and abstract of title, and the defendant filed a plea but no answer. In other words, the case was not at issue when the order appointing the referee was made; and, it is not at issue yet.

Defendant complains that there was no rule served upon him to file an answer and abstract of title—nothing but a notice to do so. This complaint has but little merit. The act of assembly provides that the defendant shall file his answer and abstract and says nothing about rule or notice. It is true that the defendant may be ruled to do what the law says he must do and only so far as our rules of court on this question are in consequence with or furtherance of the provision of the act of 1901 are they in force. The difficulty with defendant's contention on this point is that he is forced into the position of taking advantage of his own *laches*. But, this is of no moment now, owing to the view

we take of the proceedings. For the same reason we shall not discuss the merits of the case.

The case could not be tried without an issue; nor can a case be referred until "after issue joined."

Now, January 4, 1909, the report of the referee is set aside and the appointment of the referee is vacated. Defendant is directed to file an answer in the nature of a special plea, with an abstract of the title by which he claims, within fifteen days from this date.

An entry upon his records by the trial judge, after reversal of his decision by the supreme court, of a statement that the supreme court made a statement of the facts not supported by the record, for the purpose of bolstering up a decision neither founded on law nor supported by the facts, its opinion being an abnormally strange document, and the reversal of a decision that had been accepted law for forty years, all of which was reprehensible if the court knew what it was doing, pitiful if it did not, is held, in *Re Breen* (Nev.) 93 Pac. 997, 17 L. R. A. (N.S.) 572, to be such a violation of his duty as an attorney and officer of the supreme court as to justify his suspension or disbarment, although he declares under oath that he meant no disrespect for that court and the matters on which the statement by the supreme court was based came to its attention during the argument of the case before it, of which fact the trial judge was ignorant.

Damages for personal injuries to a pregnant woman are held, in *Prescott v. Robinson*, 74 N. H. 460, 69, Atl. 522, 17 L. R. A. (N.S.) 594, to include compensation for mental suffering because of the probable deformity of the child as a result of the injury, as well as for her disappointment at the birth of a deformed child, but not for regret because of the child's suffering on account of the deformity.

Forbidding the employment of children under twelve years of age in factories or manufacturing establishments is held, in *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N.S.) 602, not to violate the constitutional rights of the child or its parent.

In the Court of Common Pleas of Lackawanna County.

No. 146, March Term, 1907.

Rule for a New Trial.

Hinks & Johnson vs. George Chichura.

A contract for the sale of a second-hand carriage, even though the plaintiffs added to it such necessary repairs as were stipulated for in this case, is clearly not such a transaction as would enable them to recover the purchase price upon the defendant's refusal to accept.

Mr. John F. Murphy, for plaintiffs.

Mr. James J. O'Malley, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

The evidence on the part of the plaintiffs was to the effect that the defendant made a contract with them, through their agent, to purchase a second-hand carriage, for which he agreed to pay them \$450, and an old landau which he had. The carriage was in a shop in the city of Scranton, and both parties agree that the plaintiff was to furnish and put new rubber tires on it; after which the plaintiffs' agent testified, the defendant was to bring his landau and take the carriage and pay \$75 in cash and give notes for the balance. The defendant claimed that in addition to putting on new rubber tires, the plaintiffs were to repaint the carriage and replace one of the panels which was split, and deliver the carriage to him at Olyphant. He testified, and was corroborated by another witness, that no new tires were put on; that the panel was not replaced; and the carriage was not repainted, or if it was the painting was not such a job as he had a right to expect, and for these reasons he refused to take the carriage. The evidence on the part of the plaintiffs was that new tires were put on.

Plaintiffs' statement appears to have been framed with a view to claim for the contract price of the carriage, and their counsel tried the case on that theory, but acting upon suggestion from the trial judge, some evidence was given for the purpose of proving damages for the defendant's failure to accept the carriage. It is somewhat doubtful if the statement would warrant a recovery on this phase of the case, but the plaintiffs were given the benefit of the doubt, and the case was submitted to the jury on that theory. And this action of the court is assigned as a reason for a new trial.

We are not convinced that there was any error of which the plaintiffs can complain. A contract for the sale of a second-hand carriage, even though the plaintiff's added to it much necessary repairs were stipulated for in this case, is clearly not such a transaction as would enable them to recover the purchase price upon the defendant's refusal to accept. If the plaintiffs neglected to make the repairs, as the defendant claimed, he was justified in refusing to accept the carriage. And if he was not justified, their remedy was in damages for his breach of the contract. The question was submitted to the jury and they evidently credited the testimony on the part of the defendant. They were told that if the plaintiffs complied with their part of the agreement, the damage to which they would be entitled would be measured by the difference between the contract price and the market value of the carriage, plus the expense of storing it until such time as they were informed by the defendant that he would not accept it.

But the trouble with the plaintiff's case is, that, according to the testimony of their only witness on the subject, the agent who sold the carriage, it is doubtful if they suffered any damage. He testified that the carriage is worth \$550. He contracted to sell it to defendant for \$450, and an old landau, the value of which fixed by different witnesses at from \$25 to \$100; and there was a conflict in the testimony as to the time when the defendant refused to accept the carriage, and the evidence as to storage charges, was, therefore, indefinite; hence, it is not at all clear that the plaintiffs were wronged by the verdict.

Plaintiffs' counsel contends that the only question that was left to the jury, by the charge of the court, was the cost of storing the carriage; but we think the charge taken as a whole, is not subject to this criticism.

The rule for a new trial is discharged.

A homestead donation entered by a man and wife, the title to which is finally secured by his performance of the legal requirements, is held, in *Creamer v. Briscoe* (Tex.) 109 S. W. 911, 17 L. R. A. (N. S.) 154, to be the community estate of such persons, although, before expiration of the time required for perfecting the title, the wife dies and the man remarries.

In the Court of Common Pleas of Lackawanna County.

No. 415, May Term, 1906.

Rule for a New Trial.

Ellen Gemeinder, et. al. vs. Borough of Dickson City.

Where planks of a bridge had been used as long as such timber usually lasts it was negligence to omit proper precautions to ascertain their true condition, and if a defect existed so long that the Borough authorities, in the exercise of reasonable care and supervision, should have observed it, then it was negligence in not discovering and repairing it.

Mr. C. P. O'Malley, for plaintiffs.

Mr. M. J. Martin, for defendant.

Opinion by Carpenter, A. L. J., December, 1908.

This is an action brought against the defendant Borough for the negligence of its officials in failing to keep in repair a bridge on the Main street of the Borough, by reason of which the plaintiff, Ellen Gemeinder, was injured.

The evidence was that as she was walking across the bridge, one of the planks upon which she stepped broke own and her foot and leg went through it and she fell backwards, and the portions of the broken plank pressed against her leg in such manner that she was unable to extricate it without assistance. She claimed and produced evidence tending to prove that she was seriously, and perhaps permanently injured.

All the reasons for a new trial allege that the court was in error in answering the points presented by the respective parties. Many of them are based upon the theory that the portion of the bridge upon which the plaintiff was injured was a sidewalk, and that a different rule is to be applied in fixing the defendant's responsibility than would apply if the injury had occurred on the portion of the bridge devoted to travel by teams and vehicles.

The evidence, however, does not support this theory. The bridge was constructed and maintained by the Borough, and extended all the way across the street, from fence-line to fence-line. As originally constructed it was a flat surface the entire width; but a few years before the accident the Borough authorities elevated the two ends some eight inches above the other portion, thus forming what was sometimes

spoken of on the trial as sidewalks. These so-called sidewalks were used by pedestrians in traveling along the highway, but they were as much a part of the bridge and highway as was the portion used by teams. They were so regarded by the Borough officials, who repaired them from time to time; and it is clear that their duty to the public to keep them in reasonably safe condition for the purpose to which they were adapted was as imperative as it was concerning the other part of the bridge. The duty was primary and absolute as to all parts of the bridge and if the planks on this part of the bridge had been there as long as timbers of that character usually last it was negligence to omit proper precautions to ascertain their true condition, and if a defect existed so long that the Borough authorities, in the exercise of reasonable care and supervision, should have observed it then it was negligence in not discovering and repairing it.

The case was submitted to the jury on this theory; and without discussing in detail the reasons assigned for a new trial we think the rule adopted was fully warranted by the authorities, as applied in similar cases.

The rule for a new trial is discharged.

A passenger who is injured by a train going into a washout while he was voluntarily riding on the platform of the fast-moving train when there was room inside the car, in the nighttime, in the midst of or soon after a severe rainstorm, no one inside the car being injured, is held, in *Miller v. Chicago, St. P. M. & O. R. Co.* (Wis.) 115 N. W. 794, 17 L. R. A. (N. S.) 158, not to be free from contributory negligence as matter of law.

The secretary-treasurer of a corporation, who is also its manager, is held, in *Laird v. Michigan Lubricator Co.* (Mich.) 116 N. W. 534, 17 L. R. A. (N. S.) 177, to have no implied authority to contract for the services of an employee for a term extending beyond not only the term of his own office, but that of a board of directors, in the absence of custom or his being held out by the directors as having such authority.

In the Court of Common Pleas of Lackawanna County.

No. 558, May Term, 1908.

Rule to Strike off Judgment as to Patrick L. Casey, et. al.

Thomas P. Gordon vs. John W. Casey, et. al.

A person cannot, involuntarily, make himself a party to litigation between others.

Mr. James J. O'Malley, for plaintiff.

Mr. John J. Manning, for defendant.

Opinion by Newcomb, A. L. J., January 2, 1909.

Andrew Palubuak, the petitioner for this rule, is not a party to the judgment. The proceeding was a *scire facias* upon a judgment recovered against the co-partners to 379 November Term, 1906. Apparently the only purpose of the writ was to bring in Patrick L. Casey as terre tenant. As against him and one of the original defendants it went to judgment May 20, 1908, by default for want of appearance, etc. As to the other defendant there was no service. Upon this another *sci. fa.* was issued June 29th to 749 September Term, 1908, in which both Patrick L. Casey and the petitioner are named as terre tenants, and this is still pending.

Palubuak is not only a stranger to the judgment which he seeks to have vacated, but, in addition to that, he sets up no irregularity apparent on the face of the record. So far as concerns the mere form of relief, however, that could be moulded to meet the nature of his case provided he were entitled to be heard.

He claims title to a certain parcel of land by deed of April 23, 1908, from Patrick L. Casey who held under John W. Casey, one of the original defendants, by deed long before the judgment against the partners was recovered. Therefore, he seriously contends that without the relief asked for this land may be taken in execution to satisfy the judgment.

To this it might be answered that the judgment was either a lien, or it was not. If it was, it cannot be disturbed in this way. If it was not a lien the petitioner's title will not be divested by a sale on the judgment and his defence can be made on ejectment. If, on the other hand, the attempt should be made to subject the land to the lien, through the

later *sci. fa* now pending, he can make his defence there, for to that proceeding he is a party. But for the purposes of this motion it only need be said that it is a voluntary attempt by his own act or statement on the record to make himself a party to litigation between others. This he cannot do.

Phila. v. Jenkins, 162, Pa., 451.

Smith, et. al., v. Levy, 6 Pa. Sup. Ct., 23.

Fees v. Shadd, 20 Ib., 193.

Builders' Exch. v. Surety Co., 9 Lacka. Jur., 18.

The rule to show cause is discharged.

That a person without a license, who practices midwifery, making use of the instruments usually employed for that purpose, and of certain printed formulas for conditions encountered in the practice, may be found guilty of violating a statute requiring a license to practice medicine, is held in *Com. v. Porn*, 196 Mass. 326, 82 N. E. 31, 17 L. R. A. (N. S.) 94.

One who has contracted to do public work according to plans and specifications, in reliance upon the estimate of the engineer in charge of the work on behalf of the public, which believes the estimate to be correct, is held, in *Long v. Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96, not to be precluded from securing a cancelation in case the estimate is not even approximately correct by the fact that the contract stipulates that the estimate is approximate only, and that he is satisfied therewith, and has judged for himself as to all conditions affecting the cost of performance.

In case of negligent injury to a pregnant woman, resulting in a miscarriage, it is held, in *Morris v. St. Paul City R. Co.* (Minn.) 117 N. W. 500, 17, L. R. A. (N.S.) 598, that the pain and suffering which the mother would have suffered had the child been born in the natural course of events cannot be deducted from the pain and suffering occasioned by the miscarriage which resulted from defendant's negligence.

In the Court of Common Pleas of Lackawanna County.

No. 1049 November Term, 1908.

Certiorari.

City of Scranton vs. Thomas Allargie.

An ordinance, forbidding the carrying of deadly weapons, to be valid, should have words similar to the following: "That the intent therewith unlawfully and maliciously to do injury to any person."

Mr. D. J. Davis, city solicitor, for plaintiff.

Messrs. Ammerman & Maxey, for defendant.

Opinion by Edwards, P. J., January 4, 1909.

Defendant was convicted under an ordinance of the city of Scranton for carrying concealed weapons.

The ordinance is as follows:

"It shall be unlawful for any person in the city of Scranton to wear under their clothing or concealed about their person, any pistol or revolver, nor shall any person wear under their clothing or concealed about their person and slung-shot, hand-billy, cross-knuckles or knuckles of lead, brass or other material, or any bowie-knife, razor, dirk, dirk-knife, or any other dangerous or deadly weapon.

"Any person violating any provision or requirement of this ordinance shall, upon conviction thereof, be subject to a penalty of not less than ten dollars nor more than one hundred dollars, to be collected by summary proceedings before the mayor or any police magistrate, and in default of payment of the same, shall be committed to the county jail for a period not exceeding thirty days."

To make this ordinance valid there should have been added to it words similar to the following: "With the intent therewith unlawfully and maliciously to do injury to any person." These are the words that saved the act of assembly prohibiting the carry of concealed weapons from being declared unconstitutional: *Wright v. Commonwealth*, 77 Pa., 170.

The ordinance should be amended. As it stands it is unconstitutional. Proceedings reversed.

In the Court of Common Pleas of Lackawanna County.

No. 1297, September Term, 1908.

Rule for Judgment.

Charles J. Webb & Co., Incorporated vs. Scranton Yarn Finishing Company.

Court will direct the filing of a supplemental affidavit of defence, where the plaintiff's claim is vague and indefinite.

Messrs. Welles & Torrey, for plaintiff.

Messrs. Daniels & Bunnell, for defendant.

Opinion by Edwards, P. J., January 4, 1909.

The conclusion cannot be avoided that any defense the defendant might have to the plaintiff's claim in this case must be based on the assumption that there has been an acceptance of the goods described in plaintiff's statement. This is clearly apparent from the length of time which has elapsed since the goods were received with no attempt to return them, and it is evident also from the admissions in the affidavit of defense itself.

In order to understand clearly the nature of defendant's contention it would be desirable to know the basis on which the goods were purchased. Were they purchased after inspection by the defendant? Or, by sample, or in some other way?

We have examined the affidavit of defense and we find that some of the paragraphs contain a suggestion of a defense, at least to a part of the plaintiff's claim; but the first and concluding paragraphs are vague and indefinite.

Let the defendant within ten days from this date file and submit to the court a supplemental affidavit of defense; otherwise judgment for the full amount of plaintiff's claim.

Where an agent acts for both parties in making a contract requiring the exercise of discretion, it is held, in *Horner v. Spencer*, (Okla.) 95 Pac. 757, 17 L. R. A. (N. S.) 622, that the contract is contrary to public policy, and avoidable in equity upon the application of either party.

In the Court of Common Pleas of Lackawanna County.

No. 625, May Term, 1907.

Rule to Open Judgment as to Michaelena Peterson.

John Pietrewicz vs. Anthony Peterson and Michaelena Peterson.

An application to open a judgment entered on a judgment note is addressed to the equitable powers of the court and when the weight of the testimony is clear against the contention of the defendants the rule to open the judgment will be discharged.

Mr. P. F. Loughran, for plaintiff.

Mr. George H. Rice, for defendants.

Opinion by Edwards, P. J., January, 1909.

The judgment in this case is entered on a judgment note signed by the husband and wife. The amount of the note is \$200. We are asked to open the judgment as to wife on the ground that she signed the note as surety for her husband. Defendant's depositions consist of the testimony of the husband and wife. Each testifies that the wife signed the note as surety for her husband. The plaintiff in his depositions testifies otherwise and gives with much particularity the circumstances pointing to a loan to the wife and not to the husband. If the evidence of the interested parties were the only evidence in the case, it would be our duty to make the rule absolute and send the issue to a jury; but there is other evidence in the case strongly corroborating that of the plaintiff. The weight of the testimony is clearly against the contention of the defendants; and, as an application to open a judgment entered on a judgment note is addressed to the equitable powers of the court, it is our duty to exercise the discretion lodged in us by the law, and discharge the rule. The defendants are contradicted not only by the plaintiff but by three disinterested witnesses. The testimony of the justice of the peace, Mr. Slavinski, is quite convincing; and it explains how the husband's name came to be on the note. Plaintiff and the husband, Peterson, went to the justice's office to have the note drawn. The justice was informed by each of the parties that the \$200 was to be loaned to the wife and that she wanted the money to pay the building association dues and other charges on her property. The justice informed them that a married woman could not sign a judgment note

unless her husband also signed with her. Thereupon the husband signed the note, and the plaintiff, the husband and another witness went to Peterson's house to secure the signature of the wife and to pay her the money. The justice testifies further to a subsequent declaration on the part of the wife to the effect that she had borrowed \$200 from Pietrewicz and was worried because she could not pay it back to him. There are three other witnesses who corroborate the plaintiff in some material phase of the case or another.

The rule to open the judgment in this case is discharged.

A contract by a railroad company to maintain a siding for private use and to run trains to and from it is held, in *Whalen v. Baltimore & O. R. Co.* (Md.) 69 Atl. 390, 17 L. R. A. (N. S.) 130, not to be against public policy.

A mortgage is held, in *Adams v. Colonial & U. S. Mortg. Co.* 82 Miss. 263, 34 So. 482, 17 L. R. A. (N. S.) 138, to have no interest or estate in the land mortgaged which is subject to taxation where the land is located.

Entering a jury room by a trial judge in the absence of the attorneys, at the request of the jurors after having retired to deliberate on their verdict, and having any communication or conversation with the jury in reference to the case, is held, in *State v. Murphy* (N. D.) 115 N. W. 84, 17 L. R. A. (N. S.) 609, to require the granting of a new trial without consideration of the question whether such conversation was prejudicial or not.

The assumption by an agent of a debt due from a third party to the agent's principal, without authority from or ratification by the latter, is held, in *Piano Mfg. Co. v. Doyle* (N. D.) 116 N. W. 529, 17 L. R. A. (N.S.) 606, not to constitute payment.

IN MEMORIAM

Action of the Lackawanna Bar Upon the Death of Hon. Peter P. Smith, March 10th, 1909.

At a largely attended meeting of the members of the Lackawanna County Bar, President Judge H. M. Edwards presiding and Robert J. Murray, Esq., acting as secretary, the following resolutions were adopted and ordered spread on the minutes of the Court and a copy of the same sent out to the relatives of the deceased:

THE RESOLUTIONS.

"Honorable Peter P. Smith was born in Honesdale, Wayne County, on June 2, 1851, and died in Scranton on the 9th day of March, 1909. He attended the public schools of Honesdale until graduation and then entered on the study of law in the office of W. H. Dimmick. Upon his admission to the bar he quickly attained prominence and was selected by the Democratic party of his county as a candidate for district attorney, and was elected and re-elected to the office of district attorney, in which capacity he served with distinction and credit. In 1888 he was called to a larger field and moved to Scranton, where he quickly assumed a front rank among the lawyers of the bar. In 1892, upon the death of Judge Connolly, he was appointed to the Common Pleas bench of Lackawanna County by Governor Pattison, where he served for something over a year with credit and distinction. In 1895, upon the establishment of the Superior Court, he was elected to that office and his decisions stand pre-eminent among judicial decisions in Pennsylvania.

"His ability was recognized and distinguished by St. Charles College of Villa Nova, where he was given, in 1898, the degree of A. M., and by St. Mary's College at Emmettsburg, where, in 1900, he was given the degree of L. L. D.

"Few men have been gifted with the ability to grasp intricate and abstruse legal propositions with the same degree of accuracy and celerity as was Judge Smith. He had a remarkable faculty and being able from memory to recite the particular case which ruled the legal proposition before him. His knowledge of the law was not confined to any

particular branch, but he may well be said to have been a lawyer grounded in the fundamental principles of the law. Nor was his knowledge of subjects confined to the law. He was well read in literature and the classics, and in his interpretation of the law this knowledge and learning he brought into continuous use.

"His opinions while a member of the Superior Court are testimonials of his zeal and energy and his research of the authorities.

"It is with genuine and sincere regret that we have learned of his death, and it is

"Resolved, That this minute be entered in the records of our Court and a copy sent to his family, to whom our sympathy is extended in their sad bereavement."

D. J. REEDY, Chairman.
JOHN P. KELLY,
C. COMEGYS,

Committee.

Upon taking the chair Judge Edwards announced the object of the meeting and, among other things, said:

"We all know the occasion of this meeting. It is peculiarly appropriate that the bar should hold this meeting, because of the relations between Judge Smith and the members of this association. He was not only a member of this bar, but an honored member of the Superior Court bench. As a judge of the Court of Common Pleas and in all his judicial work, the members not only of this bar, but of the bar of the state, are acquainted with his high ability as a lawyer and as a judge."

Pending a motion for the adoption of the resolutions, remarks were made by several members of the bar.

Attorney John M. Harris, spoke as follows:

"I occupied desk room in the office of Judge Smith when he removed from Honesdale to Scranton, and for two years was closely associated with him. In this way I had an opportunity to observe his habits as a lawyer. One of the traits which impressed me most strongly was his wonderful capacity for work. He set before himself in everything he undertook a high standard of thoroughness and excellence. I regarded him as a sound lawyer, being well grounded in the fundamentals of the law. When engaged in looking up a question of law, he would not let go until he had reached rock bottom. I remember him on one occasion telling me that when he was preparing for the bar, and even after his admission, that he made a habit of studying Bouvier's Institutes and Dictionary of Law, and committing to memory all such legal concepts as occurred to him to be of importance. Since he made this suggestion to me I have learned from the experience of some of the

leaders of the Bar of Pennsylvania that they had formed this same habit themselves, and the practice, it seems to me, is valuable in the attempt to master any branch of science.

"As a judge of the Superior Court, his opinions were awaited with interest and regarded with the profoundest respect by the bench and bar throughout the State. In a conversation which I had with him coming from Philadelphia several years ago, he attributed his loss of health to his incessant labors on the bench. In his death the profession and the community have suffered a great and irreparable loss."

Attorney F. M. Monaghan said:

"Gentlemen: I, too, was for a time closely associated with Judge Smith. It was during the period of his early professional life; the time of his early struggles and hardest work, the time when he was laying and building the foundation for his later successes. I knew him when, as a young man and lawyer, at Honesdale, until he came to Scranton. I was familiar with his work and a witness to the great progress he made in his profession. Judge Smith was, in the full meaning of the term, a self-made man. Starting with little beyond the rudiments of the common branches, attained during his boyhood in the public schools, by the greatest industry and indomitable courage he fitted himself fully for the higher work which he was to do in the world. Coming to the bar at a very early age, he soon showed signs of his great strength as a lawyer and before very long made a place for himself among the leaders of the bar of Wayne County. Shortly after his admission he was elected district attorney of his county, and his record in that office for good and brilliant work is not second to any who have held it. The knowledge which he displayed of criminal law and practice, even as a very young lawyer, was surprising and gained for him very wide notice. But he soon graduated from the criminal branch of the law, and at the time when he left Wayne County to locate at Scranton, there were few matters of importance engaging the Courts in which he was not employed upon one side or the other. He was a very able trial lawyer. His ability to marshal evidence and fit it to the law applicable to his case was remarkable and was the secret of his great success as a trial lawyer. Often, though having no interest in the matter at issue, have I sat in court and watched and admired his splendid work in the trial of a case. As Judge O'Neill has truly remarked, Judge Smith loved the law. I have never known a lawyer with a greater regard for the dignity of the law than P. P. Smith, both as a lawyer and as a judge. He had that about him which lent dignity to his cause even though it might really not be worthy of it—no matter how trivial or unimportant it might be. No cause in which he appeared, no matter whether before judge, court, or jury, ever met with ridicule or disrespect.

"I saw little of Judge Smith after his departure from Wayne, until his nomination as Judge of the Superior Court. But when his splendid work in the Appellate Court began to attract the attention of the lawyers and judges of our state, and even of those beyond the confines of our commonwealth, I was not surprised; I was familiar with his methods, his habits, his great industry and his prodigious ability. Knowing his aptness for the law and his love of it, combined with his ambition to be known as an able lawyer and his great capacity for work I looked for good things from Judge Smith, and today I am proud to say that I was not disappointed. Judge Smith had, perhaps, if that were possible, a too exaggerated idea of the responsibility of the judicial position. That this is true may be seen in the thoroughness and conscientiousness with which he has performed his duties, and the labor he must have placed upon himself in the doing of that work.

"Intelligence of Judge Smith's failing health came to me as a shock, for I had hoped that he might be permitted full opportunity to display the great ability that was in him.

"Judge Smith was a good father, a good husband and a good brother. And, gentlemen, I want to say also, that he was a good friend. It was never necessary for Judge Smith's friends to solicit his favor could he see where he could do a friend a good turn. I have known where he has unsolicited and unexpected done favors for his friends which were invaluable to them.

"I deeply sympathize with his family in their loss. And, although I keenly regret his untimely death, it is a pleasure to me to be able to pay a tribute to the memory of my friend, Judge Smith."

Judge James J. O'Neill remarked:

At the solicitation of Judge Smith I entered his office as a law student, and any success I may have met in the law I attribute to the advice and instructions given me by him. He was devoted to the profession of the law and loved the office of judge. His work as a practitioner and on the bench always bore evidence of careful preparation and sound thought. He was painstaking and thorough in whatever he undertook. I testify my debt and gratitude to Judge Smith for his wise counsel and advice in my younger years.

Mr. F. J. Fitzsimmons paid the following tribute:

At the end of Judge Smith's first year on the Superior Court bench he received a letter from one of the foremost lawyers of the State, congratulating him upon his work and likening him to the great jurists who shed enduring lustre upon the jurisprudence of Pennsylvania. The letter contained more. It said that his election occasioned much uneasiness among those who were interested in maintaining

the high standard of the judiciary of the State. This was due, the letter said, because he was heard of at a distance only as an ordinary, rural lawyer, who had been active in local politics. It was added that a thorough search had failed to find that he bore any college degree.

I was intimately acquainted with Judge Smith, and when he received the letter he took me into his confidence to the extent of showing it to me. I well remember his saying, on that occasion, how earnestly he hoped for one thing—many years of good health—which would give him an opportunity to honorably adjust certain obligations, the existence of which made his days burdensome and his life one of worry. The loss of health brought to him more than a physical pain. In its wake came mental anguish—the acutest of human sufferings. Judge Smith loved those who were near and dear to him with even more than parental affection. Their happiness was his fondest dream. It was for them that he reached out after the unattainable. Of him it may be truly said: He was a sound lawyer, an eminent judge and a husband and a father who was ever faithful and true.

Because of illness, Judge Edwards told the meeting, former Superior Court Judge E. N. Willard, was unable to be present, and he wanted the sorrow he feels over the death of his colleague on the Superior Court bench to be expressed at the meeting.

Mr. Charles L. Hawley spoke as follows:

"Mr. Chairman and Gentlemen of the Bar: It was not my good fortune to intimately know Judge Smith until after his removal from Honesdale to Scranton. His first offices in Scranton were on the second floor of the old Odd Fellows building on Wyoming avenue, a block and a half from where we are now assembled, and directly across the hall from his offices were my own. We were within ten feet of each other and from this fact there soon resulted a business intimacy, quickly ripening into a strong personal friendship, which continued uninterrupted until yesterday, the day of his death. During those years while he was in active practice there were occasions—how frequent they were I do not now state—when the perplexities of the law caused me to make the pilgrimage across the hall and thus obtain the advantage to myself which always resulted from my talking it over with the Judge. During the years of this association I often saw the many evidences of what our friend, Mr. Harris, has so aptly termed his great genius for hard work, and it required but a short time for me to discover that Judge Smith had a profound knowledge of the law. Some lawyers are good lawyers by intuition, some become so from hard work—our late brother was the consummate lawyer that is always the product of both intuition and application. If he had died at this time his death would have impressed me, as it would have impressed us all, as the passing of

one of the most substantial lawyers of the bar of our county.

What I was to discover, Governor Pattison had for a long time known and, a vacancy occurring, showed his appreciation of Judge Smith's fitness for the bench by appointing him a judge of the Court of Common Pleas of Lackawanna County. In this position Judge Smith showed himself equal to every emergency, however suddenly presented, and made history which many judges might well envy. Having the natural judicial temperament, his knowledge of the law made him one of the best of Lackawanna County's judges, and with it all he was ever a gentleman. No lawyer here, and I see many who actively practiced before him, ever received at the hands of Judge Smith any treatment other than that which every lawyer expects and always receives from the able, courteous and gentlemanly judge. Had his death occurred at this time I would have looked upon it as a misfortune to the judiciary of Lackawanna County.

After but a short service on the bench of the Common Pleas, Judge Smith was called to the appellate bench of the Superior Court of our Commonwealth by a decisive majority of Pennsylvania's great minority, of which he had been, and was, one of the recognized leaders. Of the six suggested judges, all strong men, placed before the people by this great minority, only one, under the law, could be selected, and Judge Smith was the one chosen. Upon the bench of the Superior Court, as upon that of the Court below, Judge Smith fairly met every emergency and made for himself a record second to that of no other judge of that honorable court. His opinions, as they appear in the reports, are masterpieces of judicial logic and judicial expression. Had his death occurred at this time it would have appealed to me, and to us all, as a great loss to the judiciary of Pennsylvania.

But it was not ordained that Judge Smith should die in the harness of the lawyer, or the gown of the judge. After the expiration of his term as judge of the Superior Court, failing health compelled him to retire from his active labors and seek a well earned rest in the precincts of his home, in which he hoped for a restoration, which was not to be, and where but yesterday he breathed his last. During those years of illness the nearness of my home to his enabled me to see him with a frequency which will ever be one of my choicest recollections, and his passing away, therefore, simply leaves with me the impression that henceforth I shall miss, not the lawyer, or the judge, but the near neighbor and close friend. The later association of which I speak has an added value in that it served to give me an insight into his beautiful home life which enables me to say to you that Judge Smith was the ideal husband of an ideal wife, an ideal brother of ideal sisters, and an ideal father of ideal daughters and an ideal son. Knowing him as well as I

did, and knowing them and ourselves as well as I do, I can safely bespeak for them, in this hour of their sorrow, the heartfelt sympathy of the whole bar of Lackawanna county.

Assistant District Attorney D. J. Reedy said:

It was my good fortune to have entered upon the study of law in the office of Judge Smith. Shortly after his coming to Scranton, I entered his office as a student, and later I was associated with him in his work. When he went upon the Superior Court bench our pleasant and intimate relationship continued and lasted until his death.

Judge Smith was a man of profound learning, extraordinary memory and indefatigable energy. His success in life was not due to unusual advantages, but rather to perseverance, application and work. Stored in his memory he carried a comprehensive knowledge of individual cases, which were ever ready and at his command.

"His opinions, while a member of the Common Pleas Court and of the Superior Court bear stronger testimonial as to his ability and his knowledge of the law than any words that I, or any other friend, might offer.

His kindness to the struggling young lawyer was fully equalled by his ability. At any and all times he was ready and willing to give to the young man the benefit of his advice.

I, in common with others, will miss him. I cannot summon words to express his loss to all. His memory shall be ever treasured by me.

A valid municipal ordinance providing for the punishment of anyone maintaining or participating in a gambling game is held, in *Seattle v. McDonald*, 47 Wash. 298, 91 Pac. 952, 17 L. R. A. (N. S.) 49, not to be superseded by a subsequent statute making the carrying on of a gambling game a felony. The other authorities on this subject are collated under a note to this case.

That a servant does not assume the risk of injury from the absence of fastenings upon a trap door to prevent its sliding on its supports so as to let him through in case he steps on it, merely because he knows that there are no hinges upon it, is declared in *Burnside v. Peterson* (Colo.) 96 Pac. 256, 17, L. R. A. (N. S.) 76, where such fastenings might have been placed upon the under side, which he never had occasion to examine, and in fact did not see.

In the Court of Common Pleas of Lackawanna County.

No. 421, May Term, 1907.

Sci Fa. Sur Municipal Lien.

Motion for a Rule for a New Trial.

Percival J. Morris vs. Emma V. Christian.

Plaintiff prepared two plans for the erection of a building; the first was set aside and the second accepted. The building was erected in accordance with the second plan, the plaintiff supervising the erection of the said building.

On the trial of a scire facias, sur mechanic's lien, court held: Plaintiff was entitled to second item only, so far as the proceedings on the lien was concerned.

Messrs. Willard, Warren & Knapp, for plaintiff.

Mr. H. R. VanDuesen, for defendant.

Opinion by Edwards, P. J., February 13, 1909.

It is clear that there is only one disputed question in this case; and, as this question must be solved in favor of the defendant, it is useless to grant a rule for a new trial unless plaintiff refuses to remit a certain part of his verdict, in accordance with an order that we shall make.

Plaintiff is an architect. He prepared two plans for the erection of a building for defendant. The first set of plans were discarded and the second set of plans substituted. The building was erected in accordance with the second plan, the plaintiff supervising the erection of the said building. The case tried was a scire facias sur mechanic's lien. The plaintiff included in his claim his fees for the preparation of the first plan, and also his fees for the second plan, including compensation for supervision. He is entitled to the second item only so far as the proceedings on the lien are concerned.

The evidence in the case shows that certain payments were made by defendant on account. Nothing was said as to the application of the payments. Therefore, they should be applied on plaintiff's unsecured, or at least secured claim, viz., his fees for the first plan, or any other open account he had against the defendant.

There is no difficulty in ascertaining from the evidence the amount due to the plaintiff on his lien. It is \$825 85 principal and \$111.60 interest to the time of the verdict. The excess in the amount of the ver-

dict is \$409.05. We, therefore, make the following order:

The rule for a new trial is refused if the plaintiff, within ten days from this date, shall file a paper remitting the sum of \$409.05 from the amount of his verdict, leaving the verdict to stand for the sum of \$937.45. If the plaintiff fails to remit as aforesaid, the rule for a new trial shall be made absolute.

The liability of a railroad company for injury to a passenger by the jerking of the train in starting, while he is standing on the platform and waiting an opportunity to alight, after the train has stopped at his station, with cars standing and moving on parallel tracks so close to his train that any attempt to use the passageway between them is not unlikely to result in injury, is sustained in *Smith v. North Carolina R. Co.* 147 N. C. 448, 61 S. E. 266, 17 L. R. A. (N. S.) 179.

On the question of the dedication to public use of appropriated water it is held, in *Hailey v. Riley*, 14 Idaho, 481, 95 Pac. 686, 17 L. R. A. (N. S.) 86, that the fact that a desert entryman who laid out a town site upon the desert entry intended that the occupants should have the free use of water on the streets, or the fact that the use of the water on the streets is necessary for a reasonable enjoyment of them, and that private rights and public convenience and accommodation would be materially affected by an interruption of the use, is not sufficient to show an intention to dedicate or the fact of dedication of such water perpetually to a public use.

A person injured, although an infant, by falling down an elevator shaft in a wholesale grocery, which was left unguarded, in order to recover, is held, in *Faurot v. Oklahoma Wholesale Grocery Co.* (Okla.) 95 Pac. 463, 17 L. R. A. (N. S.) 136, to be bound to show that the owner of the premises was under obligations to protect him from the injury, and the owner of such premises is liable for the injury only where the injured person came upon them by invitation, express or implied.

In the Court of Common Pleas of Lackawanna County.

No. 42, January Term, 1908.

Rule for New Trial and also for Judgment Non Obstante Veredicto.

James Atherton vs. Lillian F. Shurtleff, et. al.

Every lease for years, unless the contrary is therein expressed, carries an implied covenant for undistributed enjoyment of the demised premises.

With respect to any appurtenance retained in the lessor's control, but essential to the integrity of the premises, there is no reason why he is not just as much bound to act in the performance of his duty to maintain as he is to refrain from acting where his act would destroy.

To say that for a breach in one case the tenant may vacate without further liability for rent, and in the other he must pay and seek redress in a suit for damages, is to assert a fanciful distinction not inherent in the nature of the case and having no sound basis in the contract of the parties.

The reason of the rule underlying the modern doctrine of eviction is the common sense ground that by the wrongful act of the lessor the consideration of the tenant's agreement to pay rent has failed.

There is no case which negatives the application of the doctrine of constructive eviction to injurious acts of omission. On the contrary it has been affirmatively applied in jurisdictions where the question is not affected by statute.

Where a tenant removed because another tenant in the same house entertained lewd company and the land'ord upon complain failed and neglected to exercise a statutory right to dispossess the offender, it was held that his claim for rent was barred by constructive eviction.

Mr. John B. Jordan, for plaintiff.

Mr. E. H. Shurtleff, for defendant.

Opinion by Newcomb, A. L. J., March 1, 1909.

There was a verdict for plaintiff in this action in replevin for goods distrained for rent under plaintiff's lease with one of the defendants. The distress was levied during the term, but after the goods had been removed from the demised premises. The right of distress was asserted upon the stipulations in the lease, (1), that any unpaid rent for the term should become due and immediately collectible upon such removal unless with the landlord's consent; and (2), in that case the removal should be deemed clandestine and fraudulent, and the goods so removed should remain liable to distress during the period of three months thereafter. The premises were vacated October 24th. The seizure was made November 7, 1907. The rent was payable monthly in advance and had been paid to November 1st before the removal. The amount distrained for was the balance to April 1, 1908, the end of the then current term.

The tenant removed after waiting ten days for the repair of the water service pipe during which the water had been turned off. It was turned off by the water company on the 14th of the month with notice at the same time to the lessor. In the meantime there had been no apparent effort to repair the pipe. A few days later, under the same conditions, the tenant of another part of the building vacated. After that the repairs were made but just when does not appear. In addition to notice by the water company, like notice was given to the landlord by one or both tenants coupled with request that the water service be restored. There was evidence that the request was made repeatedly. The landlord then made no claim that it was for the tenants or either of them to repair the damaged pipe, and on the trial asserted that she made due efforts to have it done without delay. But what she and her husband said to the tenants in reply to the complaint about the deprivation of the service was in dispute.

The jury found, upon evidence believed to be sufficient, that the lessor and her husband, who had the active management of the property, "negligently disregarded the complaint, were indifferent about it and let it go on from day to day until the thing would reasonably give rise to the inference that they were in fact indifferent and that the property was to be left in that condition an indefinite length of time."

In case it was so found, the instruction was that the plaintiff could recover; otherwise the verdict should be for defendant.

The question now is whether the facts so found amounted to an eviction of the tenant.

It was left to the jury to find that the water service passed with the lease. Technically it should have been so held as matter of law, there being no dispute as to the character of the house. While evidence outside the description in the lease may have to be resorted to in order to determine what passes, yet, the character of the property being ascertained, whether a certain thing passes with the demise is a question of intention of the parties to be collected from the words used in the lease. But, if it was error to submit the construction of the lease in that way to the jury, it did the defendant no harm.

As described in the lease the premises was: "The southerly half of first party's double house on Capouse avenue, and, according to the

city plan, numbered — in the 13th ward of Scranton, to be used as a dwelling house.”

Like all other dwelling houses in the city, those houses were equipped with “water works” in kitchen, bath-room and toilets. They were supplied with water by means of a service pipe connected with the water company’s main in the street. Without that the premises would have been unfit for “use as a dwelling house” within the meaning of the parties as expressed in the lease ; it would have been a very different thing from that for which the plaintiff promised to pay the rent reserved. It was assumed on both sides that the occasion for repairs was a leak in the pipe of casual origin due no doubt to natural wear and decay.

There was no question as to the right of the water company to turn off the water. It was turned off to stop the leakage. As between the company and the owner of private property connected with its mains, the right of the company to turn off the water to prevent waste can hardly be questioned. In this case the leak was in the street, which is the property of the city subject to the public right of way. As between the water company and the city it was probably the duty of the company to stop the leak. The case raises no question as to who was bound to pay the water rate. If the water had been cut off for non-payment of the rate a different question might be presented. But as to the means of water service no hesitation is felt in holding that the tenant took the house with the water works, including the service pipe as an appurtenance so the water could be had ; whether at his own charge for the rate or that of the owner is another thing, not at all material to this controversy. If deprived of the means of service during the term the tenant would, at the very least, be ousted from the use of material parts of the house. True, on this theory he took the lease subject to such temporary interruption of the service as might arise from necessary repairs due to decay of the pipe. If there were nothing more here than such interruption as was unavoidable the plaintiff would have no case. Moreover, if it was his duty under the contract to make the repairs he would have no case. If, on the other hand, it was the landlord’s duty to take care of the pipe then I see no reason why her persistent neglect to restore it doesn’t amount to an eviction, even though the leak originated

in no fault of hers. "An act of the landlord which deprives the tenant of that beneficial enjoyment of the premises to which he is entitled under the lease" is an eviction: *Hoeverler vs. Fleming*, 91 Pa., 322; *Gallagher vs. Burke*, 13 Pa. Sup. Ct., 244. There is no rational ground for excluding all acts of omission from the scope of this rule. It is now claimed that there was no duty of repair on the lessor, but that it was on the tenant under his covenant to "keep the demised premises in as good repair and condition" as at the date of the lease and to surrender it in the like condition excepting "natural wear and damage by the elements." In the first place, this being admittedly a case of "natural wear" it is not within the terms of the covenant in that particular; and in the second place the damaged pipe was not within the demised premises. The defect was in the service pipe in the street near the connection with the main. It must be presumed that the pipe was laid there by the owner under a license or permit carrying the right to enter upon the street as often as necessary to maintain it. It was the use, not the possession, of the pipe that the tenant took with his lease. The two tenants had that use in common; neither having it to the exclusion of the other, nor possession of the pipe in any true sense. If regarded as a part of the improvements of the owner's property the pipe must be considered as having been retained in her control. That would be entirely consistent with the respective rights of the parties in the premises as defined by their contract. Any other view, as has been said in case of a stairway common to the use of several tenants, "would lead to confusion and uncertainty and place the duty of maintenance practically nowhere": per Beaver, J., in *Lewin v. Pauli*, 19 Pa. Sup. Ct. 447.

In principle there is no apparent difference in the status of the parties to a lease as between a stairway and a water service pipe common to the use of several tenants. Each is an appurtenance to the demised estate. Each is essential to the enjoyment of the tenant's interest in the property, according to the tenor and effect of his lease. Upon the reasoning of that case the defendant here would have been liable in damages for her negligence in the premises. *E converso*, the negligence there would have been equivalent to an eviction had the stairs been suffered to disintegrate or collapse thereby excluding the tenant from the use of his room: *Hoeverler v. Fleming*, *supra*. The contention that

it is only a wrongful act of commission which will work an eviction doesn't impress me as sound. Even in cases sounding purely in tort the difference between injurious acts of commission and those of omission is technical rather than substantial. That is the result of a historical difference in the evolution of two conceptions of actionable wrongs as springing from notions of legal policy alone, in situations not affected by any question of contract or privity of estate. Here the landlord's duty, if it exist at all, was created by contract. Every lease for years, unless the contrary is therein expressed, carries an implied covenant for undisturbed enjoyment of the demised premises. With respect to any appurtenance retained in the lessor's control, but essential to the integrity of the premises, there is no reason why he is not just as much bound to act in the performance of his duty to maintain as he is to refrain from acting where his act would destroy. To say that for a breach in one case the tenant may vacate without further liability for rent, and in the other he must pay and seek redress in a suit for damages is to assert a fanciful distinction not inherent in the nature of the case and having no sound basis in the contract of the parties. The reason of the rule underlying the modern doctrine of eviction is the common sense ground that by the wrongful act of the lessor the consideration of the tenant's agreement to pay rent has failed: A. & E. Enc. L. (2d Ed.). 472; Hoeveler v. Fleming, *supra*.

True, the instances where the rule has been applied to acts apparently sounding in mere negligence seem to have been infrequent, except in New York. The authority of the New York cases as an exposition of the general or common law view is doubtful, because of a statute on the subject. By an act of 1860 it is there provided, in substance, that where without fault of the tenant the demised premises shall be so injured by the elements or other cause over which he has no control, as to become untenable or unfit for occupancy he may vacate without further liability for rent. But so far as I am able to discover there is no case which negatives the application of the doctrine of constructive eviction to injurious acts of omission. On the contrary it has been affirmatively applied in jurisdictions where the question is not affected by statute.

In *Jackson v. Eddy*, 12 Mo., 132, the plaintiff rented to defendant the lower floor of his building for a store. Plaintiff occupied the floor above for a wholesale grocery business. The tenant was bound by his lease to make all necessary repairs. During his occupancy the tenement continued in the same state of repair as when he took possession. Drippings through the ceiling from plaintiff's oil, tar and salt barrels damaged the tenant's merchandise. On his complaint the plaintiff overcame the trouble temporarily by the use of sawdust on his floor. Upon its recurrence defendant removed. Plaintiff sued for the rent and it was found that his negligence was the cause of the tenant's injury and that it was serious enough to deprive him of the beneficial use of the premises. Judgment for defendant was thereupon affirmed, the court holding that the facts found amounted to an eviction.

So, too, where the tenant removed because another tenant in the same house entertained lewd company and the landlord upon complaint failed and neglected to exercise a statutory right to dispossess the offender, it was held that his claim for rent was barred by a constructive eviction.

Weiler v. Pancóast, 71 N. J. L., 414 (1904).

If we are correct in holding the duty of maintaining the service pipe in the street was on the landlord, the case would seem to be free from difficulty. Her failure to maintain it then would be something other than a mere tort arising solely from the principle of *sic utere*, unaffected by privity of relationship; it would assume the character of a breach of a conventional obligation. The duty involved would be one created by contract. That the breach was omissive in form would be a matter of no legal consequence.

Hence the attempt to bring the case within the control of *Barns v. Wilson*, 116 Pa., 303, is illusory. The difference between the two is fundamental. The tenant there went in possession charged with knowledge that one wall of the house was a party wall, and as such was liable to be torn down at any time by order of the proper authorities in case the adjoining owner saw fit to exercise his right to build on his lot. That was a matter of statutory provision over which the landlord could have no control. It was in no sense within his covenant for quiet en-

joyment, but merely an assumed risk. It was nothing more or less than a case within the rule of *caveat emptor*, like that of *Moore v. Weber*, 71 Pa., 429. The rule underlies the doctrine that there is no implied covenant on part of the lessor that the demised premises are tenantable or will continue so, which is sought to be invoked here. But *caveat emptor* only applies to things over which the lessor has no responsible control. The demised premises might be destroyed by fire. In itself that fact wouldn't relieve the tenant from his covenant to pay rent. But his covenant is correlative to that of the lessor for undisturbed possession. And I apprehend that if the fire resulted from the negligence of the lessor in the management of his adjoining premises his covenant for quiet possession would be deemed broken. I believe the same would be true where he negligently suffered noxious and dangerous fumes to escape from his premises into those of his tenant.

It is believed that the case here was for the jury and that the facts found coupled with those not in dispute establish a breach of the defendant's covenant for quiet possession.

Both rules are discharged; judgment to be entered on the verdict *sec. leg.*

A street railway company is held, in *Norfolk & P. Traction Co. v. Ellington* (Va.) 61 S. E. 779, 17 L. R. A. (N. S.) 117, not to be within the operation of a constitutional provision abolishing the fellow-servant rule as to employees of a "railway company," where the language of the provision deals with signal points, locomotive engines, switches, despatches, and telegraphic orders, which is not applicable to street railways.

The right of the owner of land to compensation for injury to the business conducted on property, all of which is taken for public use, caused by loss of profits during its removal, is denied in *Fitzhugh v. Chesapeake & O. R. Co.* 107 Va. 158, 59 S. E. 415, 17 L. R. A. (N. S.) 124, under a constitutional provision requiring the making of just compensation for property taken for public use.

In the Court of Common Pleas of Lackawanna County.

No. 1603, September Term, 1900.

Exceptions to Referee's Report.

J. A. Dolphin vs. Borough of Olyphant.

The secretary of a town council was appointed to marshal the accounts of the borough and to ascertain the exact financial standing of the borough. He embodied the results of an extensive inquiry in his report to the council. He charged for his work the sum of \$300.00.

Held: That the amount was a reasonable compensation and that the work performed was entirely outside his duties as secretary.

Mr. C. P. O'Malley, for Plaintiff.

Mr. F. M. Lynch, Borough Solicitor, for defendant.

Opinion by Edwards, P. J., March 1, 1909.

Plaintiff was secretary of the town council of the Borough of Olyphant at a yearly salary of \$125. His duties as secretary are defined by law. These duties are specific and are fully set forth in the legislative provision quoted by the referee in his report.

On May 10, 1908, while the plaintiff occupied the office of secretary, the town council of the borough passed the following motion or resolution:

"On motion the Secretary was appointed to marshal the accounts of the borough to ascertain the exact financial standing of the borough, that the court may make suitable provision for the same, and also to advertise in one of its home papers the time when he will meet all claimants at the council room by virtue of his appointment."

The referee finds that at the time this motion was passed the borough had a large floating indebtedness on outstanding orders and unpaid bills amounting to about \$14,000, and that the plaintiff was occupied in the investigation of these claims and in ascertaining the financial standing of the borough, during a part of 1898 and down to March 27, 1899. The plaintiff embodied the results of a somewhat extensive inquiry in his report to the council. The referee also finds that the sum of \$300 was a reasonable compensation for the work done by the plaintiff.

The learned referee concludes that the services performed by the plaintiff were entirely outside of his duties as secretary. He is correct

in this conclusion. It therefore follows, that the authorities cited by defendant's counsel and which are considered and discussed by the referee do not apply to the facts of the present case.

We overrule the exceptions and direct that judgment be entered in accordance with the recommendation of the referee.

Where a passenger, a girl under fourteen years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the company's servants in carrying her past her known destination, and the conductor knows, or, by the exercise of due care and diligence, should know, of her frightened and frenzied condition, and that she is about to leave the moving car, it is held, in *Kruger v. Omaha & C. B. Street R. Co.* (Neb.) 114 N. W. 571, 17 L. R. A. (N. S.) 101, to be his duty to exercise the highest degree of care possible under the circumstances to prevent the passenger from alighting from the moving car.

The privilege with respect to communications to an attorney is held, in *Re Young*, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, not to attach to statements made by him or testator during the preparation of a will, in a proceeding to contest it on the ground of coercion, duress, and undue influence, either at common law or under a statute merely declaratory of the common-law privilege.

A combination of employees to compel the employer to permit representatives of a union to adjust all differences between employer and employees, and, to enforce compliance with the decision by a strike on the part of all, is held, in *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162, to be illegal.

A foreign involuntary assignment in bankruptcy is held, in *Re Delehanty* (Ariz.) 95 Pac. 109, 17 L. R. A. (N. S.) 173, properly to be given precedence over the claim of the assignor to share as next of kin in the personal estate of a decedent.

In the Court of Common Pleas of Lackawanna County.

No. 434, November Term, 1908.

Exceptions to Sheriff's Schedule of Distribution.

Central Loan & Investment Company vs. Benjamin T. Morgan.

A vendor cannot blend purchase money indiscriminately with labor and materials and secure the whole through a mechanic's lien.

Mr. H. D. Carey, for plaintiff.

Messrs. Dun & Dunn, for defendant.

Opinion by Newcomb, A. L. J., March 1, 1909.

Certain land of the defendant Morgan with the improvements was taken in execution and sold on this judgment. In accordance with the act of 4th June, 1901, P. L. 357, the sheriff returned a schedule of distribution of the proceeds to which plaintiff excepts. The contest is between the exceptant and George Weiland, a mechanic's lien claimant, from whom defendant acquired title. At the time of taking title defendant gave plaintiff a mortgage on the property to secure a loan with which he consummated the purchase, and its proceeds went to Weiland, his grantor. The sale was on the foreclosure of the mortgage dated in April, 1908. The sale took place November 20, 1908. The same day Weiland filed his claim with averments intended to make its lien relate back to November 15, 1907, the date of his contract with defendant. The plaintiff's lien would be thus over-reached, if that of Weiland is valid. That is the question raised by the exceptions.

It comes up now on plaintiff's petition in pursuance of the exceptions. Rule was taken to show cause why the dispute should not be determined by the court and the fund first awarded to the plaintiff, as against the sheriff's schedule which gave preference to the mechanic's lien.

The fund was insufficient to satisfy both claims.

Weiland answered, taking defense on the merits without controverting the material averments of the petition, or requesting an issue.

The question to be considered is the true interpretation of the contract upon which he founds his lien, copy of which is made part of his claim as filed, whereon he claims a balance of upwards of \$700.

There can be no dispute that he treated it as operating to transfer an interest in the land in question. The assertion of a lien relating back to its date is conclusive of that.

True, he did not in terms stipulate to convey. But for an agreed price he undertook to erect on the lot a dwelling house according to the specifications therein detailed. In that aspect the writing might be called a building contract. But it also stipulated that the "contract price includes the lot on which the house is to be built." The price was made payable "in full when completed, money to be secured from Building and Loan Association." It was to be completed by May 31st, but the legal title was conveyed April 16, 1908.

Considering the status of the parties at the date of the contract, their mutual intention as gathered from the whole paper is free from doubt. There was no attempt to make two distinct contracts. There was no attempt to distinguish between the cost of the building and the price of the lot for purposes of security or otherwise. There was no apparent intention that the contract should give rise to two liens in the hands of Weiland so different in character as that of a vendor for purchase money, from that of a builder. On the one hand there was a promise to pay an entire price for the entire property when ready for delivery; on the other, a promise to put the property in the condition specified within the time limited. The building specifications were very pertinent as matter of description to define the subject matter if a sale were contemplated by the parties.

In the absence of anything distinctly showing a contrary intention the instrument must be regarded as an article of agreement to convey the land with certain specified improvements to be added within a given time. The price named was purchase money in its entirety for which Weiland had a vendor's lien. That, however, was extinguished by the delivery of the deed. Any other interpretation of the writing leads to the conclusion that under such circumstances the vendor may blend purchase money indiscriminately with labor and materials and secure the whole through a mechanic's lien. Needless to say that cannot be done.

It follows that the mechanic's lien is invalid. But while it cannot be asserted against the plaintiff, it has not been contested by the de-

fendant. He would seem for that reason to be concluded by the act of 1901 under which the sheriff's schedule comes before us. Hence we see no reason why the balance, if any, after the payment of the mortgage will not go to Weiland's claim.

The sheriff realized \$1,500. His costs were \$69.26. The plaintiff's judgment with interest and commission for collection amounted on the date of sale to \$1,354.92. The face costs payable to the writ were \$4.85.

The exceptions are sustained and it is thereupon ordered and decreed that distribution be made as follows;

Fund	\$1,500.00
Sheriff's costs	\$ 69.26
Face costs	4.85
Plaintiff's judgment, No. 434, November	
Term, 1908	1,354.92
Balance to apply on mechanic lien.....	70.97
	\$1,500.00

The liability of the owner of a building for injury to one using its elevator to deliver merchandise by its fall, which was caused by a latent defect in a bolt embedded in a beam, which had been put in by a competent workman in repairing the elevator, which repairs had been approved by a casualty company and official public inspectors, is denied in *Sack v. Ralston*, 220 Pa. 216, 69 Atl. 671, 17 L. R. A. (N. S.) 104.

A decision of a Federal court in the district where a person indicted for crime in another jurisdiction is found; discharging him, under a writ of habeas corpus, because of insufficiency of the indictment, from custody to which he had been committed under warrant of the United States marshal in extradition proceedings, is held, in *Benson vs. Palmer*, 31 App. D. C. 561, 17 L.R.A.(N.S.) 1247, to be no bar to the prosecution of accused under the same indictment when he is subsequently arrested under a bench warrant in the jurisdiction where the indictment was found, since the court had no power to pass upon the merits of the case in the habeas corpus proceeding.

In the Court of Common Pleas of Lackawanna County.

No. 336, May Term, 1908.

Rule to Dismiss Appeal.

Commonwealth of Pennsylvania vs. Ira S. Turner:

Authority is given a commissioner of health under section 8 act 22nd of April 1905, P. L. 260, to issue an order to discontinue the discharge of sewage into any water of the state, when in his opinion such discharge is injurious to the public health.

The right of appeal from this action is given by section 11.

Mr. Frank M. Eastman, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Newcomb, A. L. J., March 1, 1909.

Whether the appeal here is free from irregularities is not the question sought to be raised by this motion. There was an attempt by defendant to appeal from an order of the state commissioner of health. The subject matter of the order was the discharge of sewage in a stream on appellant's land. The order appears to have been issued in the exercise of the commissioner's authority under section 8, act of 22 April, 1905, P. L. 260, relating to the preservation of the purity of the waters in the state for the protection of the public health. But this we gather from the respondent's brief rather than from the record. The learned counsel for the commonwealth stipulates in his brief that the petition of the defendant for leave to appeal is, by agreement, for present purposes, to be considered as such appeal. Indeed that is all there is of record. There is no transcript nor other copy of the official order which it is sought to have reviewed. It is apparent from the discussion, however, that in substance the order was to discontinue the discharge of sewage in the premises, as being in the opinion of the commissioner injurious to the public health or likely so to be. Such authority is given to the officer by the section of the act referred to.

A right of appeal from his action is given by section II. The question is whether it is given in terms to include the case of a private individual so as to enable him to contest an order touching the domestic use of his property. That, as above noted, is issued under the authority of section 8.

The argument in the negative is that in its operation the provision for appeal is restricted to orders under authority of section 5. These cover cases of technical sewers and sewer systems, as distinguished from those of mere drainage of private property.

But the provision is broad enough to obscure this view on first inspection. It is only tenable as a result of close analysis of the whole act, and the conclusion can only be reached by way of rather intricate reasoning. This, to say the least, would seem to make the question doubtful. The doubt, if any, is to be resolved in favor of the right of appeal. For that reason we cannot say the right does not exist in this instance, and the rule to show cause is discharged.

Delivering a check to a notary for protest is held, in *Wisner vs. First Nat. Bank*, 220 Pa. 21, 68 Atl. 955, 17 L.R.A. (N.S.) 1266, where by statute protest is not necessary, not to fulfil the duty of the drawee so as to relieve it from the operation of the section of the negotiable instruments law that, where the drawee refuses to return the bill within twenty-four hours, he shall be deemed to have accepted it.

An ordinance providing that any acting mayor shall be entitled to the salary of the mayor is held, in *McGillic vs. Corby* (Mont.) 95 Pac. 1063, 17 L.R.A. (N.S.) 1263, to be void under a statute providing for an acting mayor, and entitling an acting mayor who shall perform the duties of the mayor for a period longer than sixty days, to the mayor's salary.

One who keeps a lodging house in which furnished rooms are let for a single night or a longer time, with an office therein in charge of a clerk, open at all hours for the reception of guests, is held, in *Nelson vs. Johnson*, 104, Minn. 440, 116 N. W. 828, 17 L.R.A. (N.S.) 1259, to be an innkeeper, although he furnishes no food for guests, and there are no facilities for supplying food maintained at or in connection with the house, and liable to a guest for money stolen from him in the nighttime without the negligence of either party.

In the Court of Common Pleas of Lackawanna County.

No. 439, January Term, 1908.

Rule for a New Trial.

W. T. Hackett vs. John W. Shepherd.

As a general legal proposition a real estate agent, for commission, is entitled to recover if a house that was purchased was brought to the notice of the purchaser through his agency.

When the question is controverted the matter will be submitted to a jury.

Mr. W. Wfl. Lathrope, for plaintiff.

Mr. R. J. Bourke, for defendant.

Opinion by Newcomb, A. L. J., March 1, 1909.

There was a verdict here for defendant in a suit by a real estate agent for commission on the sale of defendant's property. As is usual in such actions the plaintiff had the affirmative of two propositions: (1) The existence of his alleged agency, and, (2) the performance of the alleged service. Both were seriously controverted. Failing as to either the plaintiff could not recover. There is no means of telling whether one or both was found against him. The stress of plaintiff's argument now is laid upon what seems to the learned counsel to have been erroneous instruction touching the second of these questions of fact.

The only specific instruction asked for on the subject was affirmed as by him requested. That, it is true, was general in character, to the effect that if the house in question was brought to the notice of the purchaser through plaintiff's agency he was entitled to recover.

The point of the complaint is that in defining the question as to the reality of plaintiff's services, the scope of the inquiry was narrowed to his prejudice, and that undue prominence was given to the testimony of one of his two witnesses upon whom this branch of his case depended. One was his clerk; the other the wife of the man to whom the sale in question was made. It was through her that the plaintiff claimed to connect his services with the sale. The testimony of the clerk supported the claim. As between him and the other witness there was an apparent discrepancy. According to her the clerk went with her to show

certain specific houses, but not including this. Of the four one was apparently eligible; she couldn't see the interior because the occupants were absent; incidentally they called at defendant's home in the vicinity, and there the suggestion was volunteered by his wife that her purpose could be accomplished by inspecting another house, in next lower block, with which the one in view was identical; she acted on the suggestion and was pleased with the character of the house; but when opportunity came to see the interior of the house to which attention had been called by the clerk the comparison didn't hold good; that led to negotiations between her husband and the defendant which resulted in the purchase of the house first inspected in company with the clerk.

At the trial this version of the thing seemed to raise the question whether this house wasn't brought to the notice of the buyer casually at the instance of Mrs. Shepherd, rather than anything for which the plaintiff can claim credit. The question was submitted accordingly. On further consideration we fail to see how there is any escape from the question.

It is not easy to answer the criticism that as between the two versions undue attention was given to one, without exceeding the limits of useful discussion. But after careful review of the case it is believed the criticism is not well founded. The rule for new trial is discharged.

An instrument promising, for value received, to pay a certain amount to a certain person if collected in her lifetime, is held, in *Perrin vs. Chaneler* (Vt.) 69 Atl. 874, 17 L.R.A. (L.S.) 1239, not to be void as being either an attempt by her to dispose of property at death without the required formalities, or as an attempted gift without the requisite person making a complete delivery.

A physician is held, in *Sauers vs. Smits*, 49 Wash. 557, 95 Pac. 1097, 17 L.K.A. (N.S.) 1242, not to be relieved from liability for burning a patient by the use of the Xray by the fact she quit his treatment before he was willing that she should do so, or that she neglected to follow instructions as to the use and care of the affected part.

In the Court of Common Pleas of Lackawanna County.

No. 1703 September Term, 1907.

*Exceptions to affidavit of Defense and Rule for
Judgment.*

*P. W. Lambert vs. Mary E. Fritz, trading as
John Fritz Company.*

A supplemental affidavit of defense is insufficient that does not contain more than an averment of a warranty.

Messrs. Welles & Torrey, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Newcomb, A. L. J., March 1, 1909.

The averments of the original affidavit here are wholly immaterial. Those of the supplemental affidavit raise the same question considered in *N. Y. Lap Robe Co. vs. John A. Fritz*, No. 1240 Sept. term, 1906, in which an opinion is filed at this time. For the reasons there stated these affidavits are adjudged insufficient. Rule absolute and judgment for plaintiff. The amount to be liquidated by the prothonotary in accordance with the claim as set forth in plaintiff's statement.

Where a passenger on a railroad is negligently carried beyond his destination, it is held, in *Dalton vs. Kansas City, Ft. S. & M. R. Co.* (Kan.) 96 Pac. 475, 17 L.R.A.(N.S.) 1226, that he is entitled, in the absence of other inculpatory circumstances, to recover, as damages therefor, a reasonable sum for loss of time, necessary expenses accrued, and, in addition thereto, fair compensation for inconveniences experienced, if any, on account of such action of the railroad company.

The owner of a cow, who knowing it to be vicious toward strangers, employs a stranger to milk it, assuring him that it is gentle, is held, in *Thornton vs. Layle*, 33 Ky. L. Rep. 382, 111 S. W. 279, 17 L.R.A.(N.S.) 1233, to be liable for injuries inflicted upon him by it when he makes the attempt to milk it.

In the Court of Common Pleas of Lackawanna County.

No. 274 March Term, 1899

Exceptions to Report of Referee

William W. Patterson vs. William H. Taylor.

It was proposed that certain notes given by the St. Clair Coal Company should be endorsed by Daniel E. Taylor, W. H. Taylor and W. W. Patterson, who were principal stockholders in said company and who proposed to be equally liable for said note or notes and all renewals of same.

It was further mutually agreed that they should be equally liable for one-third of the moneys that might have to be paid by said endorsers.

For the protection of each of said endorsers it was further agreed that upon the making and discounting of any such note or notes, they would each place in the hands of the cashier of the Traders National Bank, of Scranton, certificates of the capital stock of the St. Clair Coal Company owned by him, amounting to the sum of \$32,000,000 duly executed for transfer, to said cashier to hold said certificates of stock as trustee for all the parties hereto.

Provided, in case either of the endorsers of any of such notes shall be obliged to pay more than his share of the same, that is, more than one-third of what the St. Clair Coal Company shall fail to pay, the endorser or endorsers so doing shall be entitled to receive the certificate of stock so held in trust belonging to the party failing to pay his proportion, or one-third, and a certificate by the secretary of the St. Clair Coal Company certifying that any such overpayment has been made, naming the party or parties so paying more than his or their proportion, shall authorize and be sufficient authority for the said trustee to deliver and upon receiving such certificate the trustee shall deliver the certificate of stock belonging to the one failing to pay his share to the endorser or endorsers paying the same to be held by him or them as collateral security for such payment or payments, and the only remedy the defaulting endorsers shall have is to redeem his or their said stock by paying to the party or parties so paying more than his or their share of said note or notes such overpayment within ninety days of the date of such default, with interest.

Held: The only construction of the agreement which can be sustained with reason is that if ultimately and finally one of the parties to it should be required to pay more than his share of the debts of the coal company represented by the notes in question he could resort to the collateral in the hands of the trustee for indemnity. It was never contemplated that if one of them should be required to take up the notes temporarily that he could appropriate to himself the stock of the others, and afterwards be reimbursed by the company, thus getting the stock of his associates for nothing.

Notwithstanding the fact that wrongful conversion is a breach of contract, nevertheless the holder of such property is in the same situation with reference to the owners as he would be towards any one whose property he had unlawful possession of. The fact that there was a contract with reference to the property does not change the character of the conversion if it does not justify such conversion.

It is a generally accepted rule that trover will lie for the conversion of shares of stock.

Actions of trespass were maintained, without question, for the conversion of certificates of stock since the passage of the procedure act of 1887.

Messrs. Welles & Torrey and Mr. M. J. Martin, for plaintiff.

Messrs. Watson, Diehl & Watson and Mr. Everett Warren, for defendant.

Opinion by Kelly, A. L. J.. October, 1908.

In the year 1895 the Saint Clair Coal Company was incorporated for the purpose of carrying on the business of mining, preparing and selling anthracite coal in the County of Schuylkill. The incorporators were William H. Taylor, who subscribed for four hundred and ninety-nine shares of the capital stock, David E. Taylor, who subscribed for a like number of shares, and W. W. Paterson, who subscribed for five hundred shares, E. P. Kingsbury, who subscribed for one share, and John B. Law, who also subscribed for one share, the capital stock of the company being one hundred and fifty thousand dollars, divided into fifteen hundred shares, of the par value of one hundred dollars each. Previous to the time of the incorporation of the company William H. Taylor, David E. Taylor and W. W. Patterson were operating upon the same lands as partners. By the terms of the certificate of corporation it was provided that William H. Taylor, David E. Taylor and W. W. Paterson should each receive three hundred and twenty shares of the stock, and certificates therefor were duly issued to them, as fully paid and non-assessable in consideration of the transfer to the company of certain coal leases held by them.

Early in the year 1906 the company was in the need of working capital, and on the 20th of January William H. Taylor, David E. Taylor and W. W. Paterson entered into the following agreement:

"Whereas, The St. Clair Coal Company will need to borrow money for the promotion of its business, at a bank or at banks upon its note or notes, and give notes to other parties,

"And whereas, it is proposed that certain notes that may be given by the said The St. Clair Coal Company for that purpose shall be endorsed by David E. Taylor, William H. Taylor and W. W. Paterson, who are the principal stockholders in said company and who propose to be equally liable, as among themselves, for the said note or notes, and all renewals of the same, or any renewals of the same.

"Wherefore, In consideration of the premises it is mutually agreed by and among the said David E. Taylor, William H. Taylor

and W. W. Paterson, that said note or notes, and all renewals of same, when made by the St. Clair Coal Company for the purpose aforesaid, shall be endorsed by the said David E. Taylor, William H. Taylor and W. W. Paterson,

"And it is further mutually agreed by and among them, that they shall be equally liable as among themselves and to each other, for one-third of the moneys that may have to be paid upon said notes by said endorsers, regardless as to whether the one or the other shall be first, second or third endorsers upon said notes or any renewals of the same.

"And for the protection of each of said endorsers it is further agreed, by and among the parties hereto, that upon the making and discounting of any such note or notes, they will each place in the hands of the cashier of the Traders' National Bank, of Scranton, certificates of the capital stock of the St. Clair Coal Company owned by him amounting to the sum of thirty-two thousand dollars, and in the aggregate to the sum of ninety-six thousand dollars, duly executed for transfer, to said cashier to hold said certificates of stock as trustee for all the parties hereto and shall not return or re-deliver said certificates of stock, or any of them, to the owners thereof, until he shall receive from the secretary of the said The St. Clair Coal Company a certificate certifying that the board of directors of said company has duly authorized the return of the same, or portions thereof, to the owner or owners.

"Provided, in case either of the endorsers of any of such notes shall be obliged to pay more than his share of the same, that is, more than one-third of what the St. Clair Coal Company shall fail to pay, the endorser or endorsers so doing shall be entitled to receive the certificate of stock so held in trust belonging to the party failing to pay his proportion, or one-third, and a certificate by the secretary of the St. Clair Coal Company certifying that any such overpayment has been made, naming the party or parties so paying more than his or their proportion, shall authorize and be sufficient authority for the said trustee to deliver and upon receiving such certificate the trustee shall deliver the certificate of stock belonging to the one failing to pay his share to the endorser or endorsers paying the same to be held by him or them as collateral security for such payment or pay-

ments, and the only remedy the defaulting endorser or endorsers shall have is to redeem his or their said stock by paying to the party or parties so paying more than his or their share of said note or notes such overpayment within ninety days from date of such default, with interest.

"It is further understood and agreed that in no event shall said certificates of stock held by the trustee be reduced below double the amount of all the notes so discounted.

"All the conditions and agreements in the foregoing shall inure to the benefit of and be binding on the parties hereto, their executors, administrators and assigns, as fully and effectually as if said words were inserted after the names of the said parties as they occur therein.

"In witness whereof, the parties hereto have hereunto set their hands and seals, at Scranton, Pa., this 20th day of January, A. D. 1896.

"Executed and delivered in triplicate.

"Signed, sealed and delivered in presence of

(Signed) D. E. Taylor (Seal)

(Signed) William H. Taylor (Seal)

(Signed) W. W. Paterson (Seal)"

Pursuant to the said agreement the coal company made several notes amounting in the aggregate to the sum of forty-eight thousand dollars, all of which were endorsed by the three parties to the agreement, and the same were discounted at different banks in the city of Scranton, and from time to time they were renewed with the same endorsements.

In accordance with the terms of the written agreement each of the parties placed in the hands of the cashier of the Traders' National Bank of Scranton certificates for thirty-two thousand dollars of the stock of the coal company, or ninety-six thousand dollars in the aggregate, to be held by the said trustee in accordance with the terms of the written agreement. Each certificate was assigned in blank so that if it became necessary the cashier of the bank could dispose of the certificates as provided in the agreement.

About January 1st, 1898, William H. Taylor purchased all of the stock of David E. Taylor, consisting of five hundred and eighty shares, and at the time of purchasing his stock he gave to him a paper or

agreement of indemnity in which he indemnified David E. Taylor against all his liability as endorser upon the St. Clair Coal Company notes.

When these notes became due David E. Taylor refused to further endorse for renewal, and upon his refusal to endorse W. W. Paterson also refused to further endorse for renewal, and at least one of the notes went to protest, and it and the other notes as they became due, amounting to forty-eight thousand dollars in the aggregate, were taken up by William H. Taylor, the defendant, in the following manner:

He held several notes against the St. Clair Coal Company, some of which had been given for moneys due to him from the company, and the others had been given to David E. Taylor for moneys due to him from the company, and sold and assigned by him to William H. Taylor at the time of the sale of his interest in the company, and as part thereof. These notes were either past due or demand notes, and William H. Taylor surrendered them to the coal company and received time notes for the same amounts, which he endorsed and had discounted by various banks and with the proceeds paid the protested notes and took assignments of them. These notes which William H. Taylor endorsed and had discounted have since been paid by the St. Clair Coal Company or renewed, and the interest on the protested notes which were assigned to him has either been paid by the company or credited to him on its books, and from the present financial condition of the company there is no apparent reason why he will not be eventually paid in full the amount of the notes and interest.

On the 25th of April, 1898, a meeting of the directors of the St. Clair Coal Company was held and William H. Taylor, who owned a majority of the stock of the company and had absolute control of it, procured the board of directors, of which he was a member, to pass a resolution requiring the cashier of the bank, in whose hands the certificates of stock had been deposited, to return the same to him, and authorizing the secretary to issue a certificate certifying that the board of directors had authorized the return of the certificates to him; and in pursuance of the resolution the secretary did certify to the cashier of the Traders' National Bank that William H.

Taylor was entitled to receive from him the certificates of stock so held. And thereupon the cashier of the bank delivered to William H. Taylor the certificates of stock, including certificate No. 10 for three hundred and twenty shares of stock which had been deposited by Paterson in accordance with the terms of the written agreement of January 20, 1896, and he procured the stock to be transferred to him on the books of the company. Previous to that time Paterson had sold twenty shares of this stock to David E. Taylor, which was included in the stock sold by David E. Taylor to William H. Taylor, so that at the time William H. Taylor obtained this certificate from the cashier of the bank which had been deposited by Paterson, Paterson was really the owner of three hundred shares.

In this suit Paterson seeks to recover from William H. Taylor the value of three hundred shares of stock so procured by William H. Taylor, in an action of trespass. The parties agreed to refer the case to the Honorable J. W. Carpenter, under the provisions of the act of 1869, and its supplements, and we now have before us the report of the referee in which he directs that judgment be entered for the plaintiff for forty-five thousand nine hundred dollars, to which report exceptions have been filed both by the plaintiff and the defendant.

The consideration of the exceptions raise the following questions, viz.: (1) Was the conversion of the stock which had been deposited by Paterson with the cashier of the bank under the terms of the written agreement of January 20, 1896, unlawful? (2) If the conversion was unlawful can the plaintiff recover damages in an action of trespass? (3) If the plaintiff is entitled to recover in this action is the measure of damages the value of the stock at the time of its conversion or its highest value since then up to the time of the trial? (5) If the measure of damages is the value of the stock at the time of its conversion is there evidence in the case to sustain the referee's finding of fact that at that time it was worth par. or one hundred dollars per share?

As to the first question it seems clear that the conversion of the plaintiff's stock by the defendant in the manner shown by the undisputed evidence was wrongful. The only construction of the agreement of January 20, 1896, which can be sustained with reason is that

if ultimately and finally one of the parties to it should be required to pay more than his share of the debts of the coal company represented by the notes in question he could resort to the collateral in the hands of the trustee for indemnity. It was never contemplated that if one of them should be required to take up the notes temporarily that he could appropriate to himself the stock of the others, and afterwards be reimbursed by the company, thus getting the stock of his associates for nothing. Yet that would be the practical result of holding that the defendant had the legal right to take the plaintiff's stock in the manner in which he did. Apparently he will eventually be repaid the forty-eight thousand dollars with interest. At any rate it does not yet appear that he will finally be out of pocket at all on account of them. The discussion of the learned referee upon this branch of the case is so satisfactory that nothing more need be added.

The next question is will an action of trespass lie?

When the several parties to the agreement of January 20, 1896, deposited their certificate of stock with the trustee they respectively pledged them to each other as security, and whenever property pledged is wrongfully converted or misapplied in violation of the terms of the contract under which it is held, the pledgor may maintain an action of trover: 22 Am. & Eng. Ency. Law, 2d Ed., 873. Notwithstanding the fact that the wrongful conversion is a breach of contract, nevertheless the holder of such property is in the same situation with reference to the owner as he would be towards anyone whose property he had unlawful possession of. The fact that there was a contract with reference to the property does not change the character of the conversion if it does not justify such conversion.

In 1 Cook, on Stock and Stockholders, sec. 575, it is stated as a general rule that an action on the case lies for a conversion of shares of stock, and in sec. 576 it is said that it is a generally accepted rule that trover will lie for the conversion of shares of stock. "This is the favorite remedy when the shareholder has been unjustly deprived of his stock, and it is no where denied, except in Pennsylvania, that this form of action is proper. But even there, for the conversion of a certificate of stock, trover will lie," says the author, citing numerous cases to sustain him. And in 28 Am. & Eng. Ency. of Law, 2d Ed., 651, we find the same principle stated. "It is well settled that trover

lies for the conversion of stock, bonds, deeds, notes and the like": 21 Am. & Eng. Ency. Pl. & Pr., 2021.

These authorities demonstrate beyond question that the general rule is that trover will lie for the wrongful conversion of shares of stock, but in Pennsylvania there seems to be a partial exception to the general rule. It had its inception in *Sewell vs. Lancaster Bank*, 17 S. & R., 274, where Huston, J., in delivering the opinion of the court remarked that, "Though trover might lie for a certificate of stock, as it does for a bond or deed, yet it will not lie for one hundred shares of bank stocks any more than it would for a debt due on a right of entry." This case was cited and the same principle adopted in *Neiler vs. Kelly*, 69 Pa., 403, in which Sharswood, J., stated: "A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share of the capital stock of a corporation than it can for the interest of a partner in a commercial firm. The two cases are precisely analogous. But the document or writing which is the evidence of ownership is a tangible corporeal thing—the subject not only of property but of possession—the right to which is essential in trover."

In *Pa. Co. for Ins., etc. vs. R. R.*, 153 Pa., 160, and in *Ryman vs. Gerlach*, *Ibid.*, 197, both cases arising since the passage of the procedure act of 1887, actions of trespass were maintained for the conversion of certificates of stock without question. The conversion in this case was of a certificate of stock in the *St. Clair Coal Company*. The plaintiff had the undoubted right of possession of it as against the defendant, and for damages the proper remedy under the general authorities and our own authorities as well is an action of trover, and trespass in Pennsylvania.

The learned referee has not found that there was any relation of trust or confidence between the parties or any fraud or outrage in the conversion of the stock certificate, and has, therefore, adopted the general rule on the measure of damages, viz.: the value of the stock at the time of the conversion. In this upon a full consideration of

all the evidence we think he was clearly right. There is nothing in the case to indicate that the defendant did not believe he was entirely within his rights under the terms of the contract of January 20, 1896, when he converted the stock, and the rule of law which fixes the highest market value of the stock between the time of the conversion and the time of trial as the measure of damages does not apply: *Learock vs. Paxson*, 208 Pa., 602. There is ample evidence in the case to sustain the referee's finding that the stock was worth par at the time of the conversion by the defendant and it would serve no purpose to refer to it in detail.

Further discussion is unnecessary. We are of the opinion that the referee disposed of the case upon sound legal principles and that no reasons have been shown for disturbing his findings of fact. The exceptions are all dismissed and judgment is directed to be entered in accordance with the referee's findings.

One who walks beside a load of wood towards a railroad crossing on a stormy day, when the view of the track is obscured and sound diminished, without taking any precaution to ascertain whether or not a train is approaching from the opposite side, is held, in *Schwartz vs. Mineral Range R. Co.* (Mich) 116 N. W. 540, 17 L.R.A. (N.S.) 1253, to be guilty of negligence which will preclude a recovery for his death in case he is killed by a train from that direction, and the fact that, if trains were on time, the next one would approach on the side on which he was walking, is held to be immaterial, where a train was due to pass in the opposite direction but a short time previous.

Assignees for creditors are held, in *Cox vs. Malden & M. Gaslight Co.* 199 Mass. 324, 85 N. E. 180, 17 L.R.A. (N.S.) 1235, not to be identified with the assignor so as to entitle a corporation which had been supplying gas to the assignor to refuse to supply it to the assignees, who desire temporarily to continue the business, until the amount due by the assignor is paid, under a statute giving it permission to shut off gas from the premises of one who refuses to pay the amount due therefore, but forbidding it to do so merely because a bill remains unpaid by a previous occupant of the premises.

In the Court of Quarter Sessions of Lackawanna County.

No. Sessions, 1909.

In Re: Appointment of Tax Collector, for the Borough of Blakely.

The favoring of the appointment of a certain person for tax collector by municipal bodies, which levy the taxes, will be duly considered by the court, in making the appointment

Opinion by Edwards, P. J.

March 1, 1909.

Several petitions have been submitted for the appointment of a tax collector for the borough of Blakely to fill the vacancy caused by the death of D. C. Phillips, who was collector and collector-elect at the time of his death. We direct all the petitions to be filed. The petitions for the appointment of Phillip D. Phillips are not only very numerous signed by the electors of the borough but are also signed by the municipal bodies levying the taxes in said borough. We, therefore, appoint the said Phillip D. Phillips collector of taxes for the said borough of Blakely to fill the present unexpired term of the said D. C. Phillips, deceased, and also for the full term of said office to which the said D. C. Phillips was elected at the last February election.

The right to an injunction to prevent threatened, repeated, wrongful interference with the attempt of a citizen to take wild fowl upon the public navigable waters of a state is sustained in *Ainsworth vs. Munoskong Hunting & F. Club* (Mich.) 116 N. W. 992, 17 L.R.A. (N.S.) 1236.

Where land is conveyed to a trustee for the maintenance of a family, it is held, in *Talley vs. Ferguson* (W. Va.) 62 S. E. 456, 17 L.R.A. (N.S.) 1215, that none of the beneficiaries has any distinct or separable interest therein during the existence of the trust which he can charge or alien.

An enforceable contract for the purchase of real estate is held, in *Re Boyd* (Iowa) 116 N. W. 700, 17 L.R.A. (N.S.) 1220, to be a credit subject to taxation, although it provides for forfeiture on default of the purchaser.

In the Court of Common Pleas of Lackawanna County.

No. 1240 September Term, 1906.

Exceptions to Affidavit of Defence and Rule for Judgment.

New York Lap Robe Company vs. John A. Fritz.

The defendant alleged breach of warranty and his election to rescind. He stated that the goods were sold to him by samples shown and under an express warranty, but by whom samples were shown and warranty made do not appear.

Held: The averment is believed to be insufficient. The mere averment of a warranty, without more, is bad; the affidavit should disclose whether it was express or implied, set forth its terms and state when, by whom, and by what authority it was made.

Where the facts are not in dispute the right to rescind is a question of law for the court.

Messrs. Welles & Torrey, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Newcomb, A. L. J., March 1, 1909.

This action is for merchandise sold and delivered to defendant at an agreed price and term of credit. The defendant alleges a breach of warranty and his election thereupon to rescind. This is an affirmative defense which casts upon him the burden of distinctly showing a case to justify his repudiation of the sale. It is upon him to show, (1), the condition of the contract; (2), the plaintiff's breach; and, (3), his disaffirmance with a return of or offer to return the goods promptly and before acceptance.

The condition of the sale, as he states, was this: "Said goods were sold to me by sample shown and under an express warranty that they should agree in all respects with the sample."

By whom the sample was shown and the warranty made does not appear. The averment is believed to be insufficient. "The mere averment of a warranty, without more, is bad; the affidavit should disclose whether it was express or implied, set forth its terms, and state when, by whom and by what authority it was made."

Gould v. Gage, 118 Pa., 559.

It may be the terms are sufficiently set out, and that by intentment it could be assumed that the time was the date of sale as gathered from

plaintiff's statement. But in no way does it appear who is claimed to have made the warranty, nor by what authority, real or apparent, he was acting.

That is not all. While, as between the goods delivered and the sample, a substantial variance is shown, the averment as to the exercise of the right to rescind is as follows: "Immediately upon the discovery of these facts I notified plaintiff I would not accept the goods and that the same were at his disposal." The purpose of this, if anything, was to show that he had exercised his right within a reasonable time. Where the facts are not in dispute that is a question of law for the court: *Leaming v. Wise*, 73 Pa., 173; *Howard v. Turner*, 155 Pa., 349. On this motion the averments of the affidavit must be taken as true. That rule, however, has reference only to the facts so far as well stated. In any event the question of the due exercise of the vendee's right to reject the goods is a conclusion, either for the court or the jury; never for the party. It is necessarily for the court at this stage of the case. Had the defendant seen fit to disclose the date when the delivery was made; when and how he discovered the breach and when he gave notice, the court could tell whether the facts give rise to the conclusion which he asserts. For anything that now appears the discovery may not have occurred until after he had kept the goods so long as to estop him from denying acceptance. In that case his remedy would be only in damages for the breach, and as against this action his defense would be only *pro tanto*: *Freyman v. Knecht*, 78 Pa., 141. "Immediately upon the discovery" may have been within reasonable time for refusal to accept, or it may not. That would depend upon how long he kept the goods under circumstances which would impute to him knowledge of their quality. But as a claim for damages the affidavit furnishes no basis whatever for their assessment: *Ogden v. Beatty*, 137, Pa., 197; *Weed & Co. v. Weinberger*, 12 Pa., Sup. Ct., 12.

Upon its meagre statement of facts the affidavit is vague and evasive. It is, therefore, adjudged to be insufficient and the rule to show cause is made absolute. Judgment is directed to be entered for plaintiff for the amount of the claim as set forth in its statement, *sec. reg.*

In the Court of Common Pleas of Lackawanna County.

No. 737, January Term, 1907.

Exceptions to Referee's Report.

John R. Eley vs. Saverio Rosato.

The validity of a referee's findings is to be determined upon the question as to whether there was evidence to support the findings, no matter what the conflict may have been.

Mr. W. A. Jennings, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Newcomb, A. L. J., March 3, 1909.

The exceptions go only to the referee's conclusions of fact. The exceptant, therefore, has the burden of showing that they were unwarranted in any view of the evidence. That was conflicting. It may be that in some particulars we would have reached a conclusion different from that of the referee if that were our function. But that is not the test by which the validity of his findings is to be now determined. The question is whether there is any evidence to support his finding, no matter what the conflict may be. We cannot say there is none, and that is decisive against the exceptions. They are accordingly dismissed, the report is confirmed and judgment is directed to be entered in accordance therewith.

Merely squatting on real estate without notice to the true owner, although the squatter makes pretense of holding adversely, is held, in *Japerson v. Scharnikow* (C. C. A.) 150 Fed. 571, 15 L. R. A. (N. S.) 1178, to constitute no foundation for the acquisition of title by adverse possession. The authorities upon the necessity of color of title, when not expressly made a condition by statute, to found by adverse possession, are collected in a note to this case.

That a state may obtain title by the assertion and maintenance of adverse possession for the statutory period is upheld in *Malone ex. rel. Board of Harbor & L. Somers v. Ellis* (Mass.) 84 N. E. 430, 15 L. R. A. (N. S.) 1120.

In the Court of Common Pleas of Lackawanna County.

No. 1661, September Term, 1907.

Rule to Amend Plaintiff's Statement.

Laura A. Gregory vs. W. S. Huslander.

A motion to amend so as to enlarge the amount of a claim will be denied where it would introduce a new cause of action, barred by the statute of limitations. There was nothing to show that the defendant was bound to settle before the proceeds of the sale were fully realized. The thing entrusted to him was in the nature of an entire contract.

The final instalment came to his hands in 1904. It was not apparent that any right of action accrued before that time.

Held: Under such showing a rule to show cause why amendment shall not be allowed will be made absolute.

Messrs. Leach and Morrow, for plaintiff.

Mr. S. B. Price, for defendant.

Opinion by Newcomb, A. L. J., March 8, 1909.

Plaintiff declared for money had and received. She now moves to amend so as to enlarge the amount of her claim by something like \$2,000. The motion is contested on the ground that if allowed it would introduce a new cause of action, now barred by the statute of limitations, thus working an injury to the defendant. If that be so, the motion must be denied: *Trego v. Lewis*, 58 Pa., 463; *Grier v. Assurance Co.*, 183 Pa., 334; *Phila. v. R. R. Co.*, 203 Pa., 38.

As alleged the right of action was the breach of defendant's agreement in his relation with plaintiff as her attorney and confidential adviser. He is a member of the bar. According to the declaration he undertook to and did acquire "control and possession" of certain coal property in which plaintiff had an interest in common with other parties; for this purpose the plaintiff from time to time furnished the purchase money and expenses required, amounting to about \$1,700, in various instalments between August 5, 1896, and October 26, 1897; it was stipulated that for his services in the matter the defendant should have one-half the net profits arising out of his eventual sale of the property; the sale was made and the proceeds, amounting to \$6,217, came to his hands in six instalments between April 6, 1901, and November 29, 1904, inclusive; on the date of the last instalment he gave to the plaintiff \$1,000, and promised to make further payment later; other

than this sum plaintiff has received nothing; and on demand being made, at some time not stated, defendant afterwards denied any indebtedness, and at all time has failed to account to the plaintiff in the premises.

The proposed amendment varies these averments in no material particular, unless it be in stating unequivocally that defendant took title as plaintiff's trustee, and as such his subsequent conduct was a faithless breach of his duty whereby he has lost his right to the compensation agreed upon. Accordingly she now claims the entire proceeds of the property, as against the original claim of the money advanced and half the profits.

It is not apparent that this will shift or enlarge the ground of controversy or change the status of the parties. These are defined by the terms of the contract as governed by the alleged confidential relation of the parties with respect to the subject matter. The right of action remains the same. It arises only from the alleged breach of a duty created by the contract. The consequences alone are attempted to be varied. But that goes only to the measure of damages, so to speak, and is wholly a matter of law. In matters of fact, as I understand the amendment, the plaintiff is not seeking to go outside the contract, nor claiming any other or different breach than as originally asserted. If she has a case she is entitled to such damages as the law allows—no more and no less—but not to exceed the amount laid. If in the first instance they were laid at a figure less than the nature of the case may warrant, the defendant isn't injured in law by the mere enlargement of the figures. In any view of the damages I fail to see how the statute of limitations is involved. There is nothing to show that defendant was bound to settle with plaintiff before the proceeds of the sale were fully realized. The thing entrusted to him was in the nature of an entire contract. The final instalment came to his hands late in 1904. It is not apparent that any right of action accrued before that date. If it did, it was only *pro tanto* for each instalment as it was received. In that case whether the statute has run against any instalment may depend on what defendant did with respect to notice of the collection: *McCoon v. Galbrath*, 29 Pa., 293; *McCain v. Peart*, 145 Pa., 516. In any event

advantage of the statute may be taken by plea quite as well under one view of the damages as of the other.

The rule to show cause is made absolute and the amendment allowed.

An officer of a corporation who has undertaken to indemnify a bank for any debts of the corporation thereafter contracted, to a certain amount, and who has paid, after maturity, a balance due upon certain accommodation notes assigned by the corporation to the bank, is held, in *Rockefeller v. Ringle* (Kan.) 94 Pac. 810, 15 L. R. A. (N. S.) 737, not to be entitled to recover of the maker thereon either as a purchaser for value in the course of business, or as having become subrogated to the rights of the bank.

That a non-resident alien suing a non-resident alien to redress a wrong committed without the state will not be assisted to impound defendant's assets within the state by garnishment, to the prejudice of his resident creditor, who has obtained a judgment and a provisional lien against the assets, although the claim of the alien first accrued and his action was first brought,—especially where the foreign creditor is acting merely as agent for a foreign trustee in bankruptcy, who would have no standing in court,—is held, in *Disconto Gesellschaft v. Terlineden*, 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045.

Pointing an unloaded pistol at another, who does not know that the weapon is not loaded, and is put in fear by the act, is held, in *Price v. United States* (C. C. A.) 156 Fed. 950, 15 L. R. A. (N. S.) 1272, to be an assault, though not an assault with a dangerous weapon. .

A decree for suit money, and alimony, against the guardian of defendant in a divorce suit who appears only to defend on behalf of his ward, is held, in *Sturgis v. Sturgis* (Or.) 93 Pac. 696, 15 L. R. A. (N. S.) 1034, to be void, since the court has no jurisdiction to render a personal judgment against him.

In the Court of Common Pleas of Lackawanna County.

No. 1189, September Term, 1906.

Exceptions to Report of Referee.

Peter Stipp vs. Fred J. Hug.

Ordinarily, the findings of fact by a referee will not be disturbed by the court.

Mr. A. D. Dean, for plaintiff.

Mr. Charles H. Soper, for defendant.

Opinion by Edwards, P. J., March 1, 1909.

After examining the evidence in this case and the painstaking report of the learned referee we find no difficulty in sustaining the referee's conclusions, both of fact and of law.

Many of the exceptions filed by the defendant were not pressed by counsel at the argument. As to the exceptions argued, the defendant's contentions are not sustained. The evidence itself as well as the findings of the referee are against them. There are several reasons why the exceptions of the defendant cannot be sustained.

First—According to the terms of the contract the architect was the agent of the defendant and represented him in all matters pertaining to the erection of the building.

Second—The referee has found on sufficient evidence that a second contract was entered into by the parties, imposing about one-third more work on the plaintiff, and that there was no time limit in the second contract, thus modifying necessarily the limitation as to time of performance referred to in the first contract.

Third—The referee has found, and his finding is abundantly sustained by the evidence, that there was a substantial compliance with the terms of both contracts.

Fourth—Where the plaintiff, in some minor particulars, has failed to do the work in exact compliance with the terms of the contract, the defendant has failed to produce evidence which would enable the referee to determine what credits the defendant was entitled to for slight deficiencies. An instance of this is to be found in the use of a light gray mortar instead of white mortar, the change in the kind of sand used being made with the consent of the architect. Plaintiff offered to

make an allowance of twelve dollars for this item, the defendant refusing the offer; but, no evidence was offered to show how much credit defendant ought to have.

For further discussion of the merits of the controversy in this case we refer to the report of the referee.

Now, March 1, 1909, the exceptions to the report of the referee are overruled, and judgment is directed to be entered in accordance with the recommendation of the referee.

The reasonableness of a rate less than the maximum fixed by statute is held, in *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, 15 N. E. 141, 15 L. R. A. (N. S.) 763, not to be open to question in an action against a city which continues, after the expiration of its contract, to use gas without entering into a new one.

That an attorney employed by a minority stockholder to conduct a stockholders' action for the benefit of a corporation which has itself refused to sue is entitled only to a reasonable compensation out of the fund recovered, and not a contingent fee agreed upon, is held in *Graham v. Dubuque Specialty Mach Works (Iowa)* 114 N. W. 619; 15 L. R. A. (N. S.) 729.

A statute for the distribution, after reasonable notice, of the property of one who has absented himself for fourteen years, is held constitutional in *Nelson v. Blinn (Mass.)* 83 N. E. 889, 15 L. R. A. (N. S.) 651.

Building materials belonging to the owners of an unfinished building, and left therein for the purpose of completing it, is held, in *Rahm v. Domayer (Iowa)* 114 N. W. 546, 15 L. R. A. (N. S.) 727, to pass with the deed of the realty, although not annexed thereto.

An implied guaranty of advances is held, in *Miami County Nat. Bank v. Goldberg (Wis.)* 113 N. W. 391, 15 L. R. A. (N. S.) 1115, to be effected by a letter requesting a bank to let another make overdrafts, and accommodate both "him and me."

In the Court of Common Pleas of Lackawanna County

No. 16 May Term, 1908.

Demurrer to Plaintiff's Statement.

*Commonwealth of Pennsylvania, to the use of John T. Dyer Quarry
Company vs. The O'Connell Construction Co., et. al.*

The claim was for materials furnished at the instance of the principal in the bond for use in the performance of its contract, to secure which the bond was given.

While that would be a breach of its contract with the plaintiff, it would not be a breach of any condition of the bond.

Mr. Louis M. Childs and Messrs. Vosburg & Dawson, for plaintiff.
Messrs. Willard, Warren & Knapp, for Title Guaranty Co.

Opinion by Newcomb. A. L. J.

January 16, 1909.

The construction company, defendant, gave bond to the commonwealth with the Title Guaranty and Trust Company, co-defendant, as surety. It was conditioned for the due performance, by the principal, of its contract with the state for the construction a road in Chester County, under the provisions of a statute. It was also conditioned to indemnify the state against liability for material furnished to the contractor. A copy of the bond is made part of plaintiff's declaration. The only cause of action attempted to be therein averred is that plaintiff company "furnished material for the said construction for which it has not been paid, there being a balance due at this time of \$363.09, the items of which are set forth particularly in a statement attached hereto", etc.

As against the construction company alone this, at best, suggests a liability without distinctly showing it. As against the two defendants it may be assumed that the attempt was to deduce a joint liability from the obligation of the bond. But, to that instrument this plaintiff is neither a legal nor equitable party. Aside from that, liability on the bond can arise only from breach of its conditions.

For the sake of illustration it may be assumed that the claim is for material furnished at the instance of the principal in the bond for the use in the performance of its contract, to secure which the bond was given. That would make the contractor liable and failure or

refusal to pay "a balance due", would be a breach of its contract with plaintiff; but not a breach of any condition of the bond. Breach of the bond arising from that source can occur only in case the commonwealth becomes liable for the materials so furnished. And that liability can be enforced only at the suit of the commonwealth. The mere circumstance that the commonwealth is named in the caption as the legal plaintiff in this action doesn't tend to show that it is asserting a breach.

The declaration is radically defective and the demurrer is sustained.

The fact that some of an insolvent bank's commercial paper, consisting of many separate instruments acquired at different times, may have been purchased with the general funds of the bank with which trust moneys have been mingled, is held, in *Crawford County Comrs. v. Strawn* (C. C. A.) 157 Fed. 49, 15 L. R. A. (N. S.) 1100, to be insufficient to fasten the trust upon it, or upon the proceeds of a part of it.

A continuance on Sunday of ordinary sales and deliveriee of meat and ice is held, in *State vs. (S. C.)* 62 S. E. 214, 18 L. R. A. (N.S.) 617, not to be a necessity, so as to come within the exception of the Sunday laws.

The mere filling and presentation of repeated motions which are thought to be for the purpose of vexation or delay is held, in *Johnson vs. State* (Ark.) 112 S. W. 143, 18 L.R.A. (N. S.) 619, not to constitute contempt of court.

That persons knowing a woman concerning whom an article is published will not understand it in any other than an innocent sense is held in *Ervin vs. Record Publishing Co.* (Cal.) 97 Pac. 21, 18 L.R.A. (N.S.) 622 not to prevent its being libelous, if it was such that persons unacquainted with her reasonably would understand therefrom that she was a person of low character and guilty of improper and immoral conduct.

In the Court of Common Pleas of Lackawanna County

No. 1695 September Term, 1908.

Exceptions to Report of Referee.

George F. Buss vs. W. W. Johnson.

Reference: When a case is appealed to the Court of Common Pleas on transcript from an Alderman or Justice of the Peace, and is then referred to a Referee by agreement of Counsel for Plaintiff and Defendant, the case is properly triable before the referee without entering a formal technical issue.

In such instance the reference is proper and the case is triable on its merits by the Referee, and it is too late, when report of referee is made, to raise the question of the regularity of the proceedings.

Mr. Lee P. Stark, for plaintiff.

Mr. J. E. Sickler, for defendant.

Opinion by Newcomb, A. L. J.

April 26, 1909.

The only exception pressed at bar goes to the jurisdiction of the referee. It is claimed the reference was erroneous for want of an issue. The case having been referred by agreement of parties in writing, it proceeded to trial on its merits. The regularity of the proceeding wasn't raised until after a decision on the merits adverse to the exceptant. Hence, the objection is untimely and will not now be entertained if there be any escape from it.

The point is that there was no formal plea. The learned counsel, therefore, relies on the statute which authorizes such reference only when the case is at issue. But this case came into court by appeal from the judgment of an alderman. It was, for that reason, unnecessary to raise an issue by technical pleading. The cause was within the operation of our rule that all such cases shall be deemed at issue on the filing of the transcript: Com. Pl. Rule 143. The power to make such rule is hardly open to question. It doesn't operate to the prejudice of the defendant, for it deprives him of no privilege. He is at liberty to enter such formal plea as he sees fit. The defendant's position with respect to the validity of the reference is untenable, and the exceptions are accordingly dismissed and the report of the referee confirmed.

In the Court of Common Pleas of Lackawanna County.

No. 1176, September Term, 1908.

Charles W. Ash vs. Caroline Ash.

Divorce.

Divorce—Collusion Between Libellant and Respondent.

In a case where A applies for a divorce from B, and, on hearing, it appears from the testimony that there was any prior understanding or agreement between the parties that A should obtain the divorce without any contest or otherwise, the bill will be dismissed.

In such proceedings the affidavit of the Libellant to the effect that there is no collusion between the parties is not a mere empty formality, but an absolute legal requirement precedent to the granting of a divorce. The cases of Kilborn v. Field, 78 Pa. St., 194, and Latshaw v. Latshaw, 18 Sup. Ct. cited.

Mr. J. E. Brennan, for Libellant.

Mr. M. J. Ruddy, for Respondent.

Opinion by Newcomb, A. L. J., April 26, 1909.

This case is wholly uncontested. In itself that fact is of no special significance. But it doesn't stand alone. There is something more than mere acquiescence of the respondent here.

At the outset the libellant averred on oath that his complaint was not made out of levity or by collusion with his wife, etc. That was essential to the proceeding. Without it the papers would have been fatally defective: Hoffman v. Hoffman, 30 Pa., 417.

It is the settled policy of the law that the courts must be careful to see that all the legal requirements in such proceedings are complied with, both in form and substance, so that divorces may not be obtained through levity or collusion: Kilborn vs. Field, et. ux., 78 Pa., 194.

Messrs. Willard, Warren & Knapp, for Plaintiffs.

In this case while the affidavit was in due form, the libellant was apparently unconscious of its substance. He seems to have regarded it as only an empty formality.

It developed at the hearing that his wife has lived in another county since the time of the marriage, but the writ was personally served on her at the office of his lawyer in this city on the same day it was issued. Being asked to account for that the libellant testified that the parties had a meeting here at his instance; that they agreed he should get a divorce:

that in order to do so they met the next day at the attorney's office and the writ was then issued and served according to their mutual arrangement.

If the case were one of first impression the inference of a collusive proceeding would seem to be irresistible. But there is express authority on the subject which, even if so disposed, we are not at liberty to disregard. The facts bring the case directly within the control of *Latshaw v. Latshaw*, 18 Pa. Sup. Ct., 465, upon the authority of which the prayer of the petition is refused and the proceedings are dismissed.

A statement of expenditures, prepared at the instance of the principal by an agent who has returned from a foreign trip, not objected to at the time, is held in *Shepard v. Minneapolis Threshing Mach. Co.* 50 Wash. 242, 97 Pac. 57, 18 L. R. A. (N. S.) 239, to be admissible in evidence as part of the *res gestae* in an action by the agent for the salary and expenses of that trip, and not to be inadmissible as a self-serving document.

A statute requiring railroad companies to maintain on their locomotives screens which will prevent, so far as possible, sparks of fire from escaping from them, is held, in *Cincinnati, N. O. & T. P. R. Co. v. Baxter*, 33 Ky. L. Rep. 305, 110 S. W. 248, 18 L. R. A. (N. S.) 241, not to apply to sparks so small as to be likely to injure the eyes of bystanders.

One who cuts timber upon the land of another in good faith—that is, believing it to be his own land—is held, in *J. F. Ball & Bro. Lumber Co. v. Simms Lumber Co.* 121 La. 627, 46 So. 674, 18 L. R. A. (N. S.) 244, to be liable for its value at the stump, and not as manufactured into lumber.

Profits which might have resulted from the working of logs into shingles are held, in *Quay v. Duluth, S. S. & A. R. Co.* (Mich.) 116 N. W. 1101, 18 L. R. A. (N. S.) 250, not to be recoverable as part of the damages for wrongful destruction of the logs.

In the Court of Common Pleas of Lackawanna County.

No. 15, May Term, 1908.

Conclusions of Fact and Decree Nisi.

Erie Railroad Company, et. al... vs. The Borough of Dunmore, et. al.

In Equity.

Grade Crossings.

Where the tracks of a railroad company cross a public highway at grade, and such grade crossing has been in existence prior to the passage of the act of June 7th, 1901, P. L. 531, it is permissible for the municipality to improve such crossing.

The act of June 7, 1901, P. L. 531, relating to grade crossings cited and explained.

Messrs. Willard, Warren & Knapp, for Plaintiffs.

Mr. Zimmerman, for Defendants.

Opinion by Newcomb, A. L. J., April 5, 1909.

The prayer of this bill is to restrain the defendant borough from establishing a public grade crossing at the intersection of plaintiff's railroad and Jefferson avenue within the borough limits. For that purpose plaintiff invokes the prohibition of the act of 7th of June, 1901, P. L. 531, relating to such crossings.

In the first instance a preliminary injunction was granted which was dissolved after hearing on a motion to continue. That came up before the learned president judge of this court. In his opinion, filed August 19, 1908, he noted the fact that there was no agreement that the case be then disposed of finally. But he added: "Nevertheless it appears to us the case has been as fully heard on both sides as if it was before us on final hearing. For that reason we shall decide the case on its merits, making findings of fact and law, as fully as if it were at issue. etc."

Accordingly in that connection formal conclusions were stated and are now of record.

After the cause was put at issue it was submitted upon the transcript of the testimony taken on that occasion coupled with a little further testimony which adds nothing of moment to the evidence then considered.

It is not claimed that the conclusions referred to failed to cover the whole ground of controversy. Neither is it claimed that in itself the additional evidence now before us would warrant a different conclusion as to the single question of fact on which the case turns. It would be an exceptional case to say the least in which I would feel warranted in reversing one of my colleagues on a conclusion of fact. It is enough to say in this instance I see no reason to do so.

The decisive question here is whether the defendants were about establishing a grade crossing, or, on the contrary, were merely improving an existing crossing. The latter was found to be the fact and in that finding I concur.

That is the end of the case.. It is idle to regret that it is so because of the known perils incident to such crossings. Their abolition is a question for the legislature.

As applied to the facts here the true meaning of the act of 1901 is open to no question. That was settled in *R. R. Co. v. Latrobe*, 216 Pa., 221. Having been dedicated by the owner, the avenue became a public street by virtue of acceptance long before the railroad was built. It was the railroad company that then saw fit to cross at grade. It is of no legal consequence to say that the street was first improved under formal corporate action of the borough in 1892 after the road was built, and that the improvement, then ordained, stopped at the plaintiff's right of way at this point. Having chosen to accept what was offered by the owner the borough could only take the street in its entirety as dedicated. From that time ever since, the public has had the right to use it as it was, and the borough has stood responsible to travelers according to the general rules of negligence, in respect to public highways, throughout its whole extent within the borough limits.

The formal conclusions of fact as stated in connection with the order disposing of the preliminary injunction are adopted as those now found and are made part hereof as though fully set forth.

Thereupon I state the following

CONCLUSIONS OF LAW.

1. The grade crossing in question was established by the plaintiffs or one of them, as early as 1886, in the construction of a railroad. As such it has continued to be a public crossing ever since.

2. The acts of the defendant borough, complained of, amount only to an exercise of its right to improve a public grade crossing in existence before the act of 7th June, 1901, P. L. 531, was passed.

3. That statute has no application to such crossing.

4. Hence the plaintiffs are not entitled to the relief asked for and the bill should be dismissed at their cost.

Let a decree *nisi* be entered accordingly to which exceptions may be filed *sec. reg.*

Officers with the powers of sheriffs, who are charged with the duty of enforcing the law against the sale of intoxicating liquors, are held, in *Gutchell v. Page*, 103 Me. 387, 69 Atl. 624, 18 L. R. A. (N. S.) 252 to have the right to seize articles of an evidentiary nature, and detain them for use before the next grand jury as evidence against the owners of them.

In an action against a railway corporation for damages for personal injuries alleged to have been occasioned by a defective coupling apparatus, reports of its car inspectors concerning the condition of the coupler whether based upon investigations made before or after the injury, are held, in *Atchison, T. & S. F. R. Co. v. Burks* (Kan.) 96 Pac. 950, 18 L. R. A. (N. S.) 231, not to be admissible in evidence as admissions by the company of the facts stated in the reports, unless such reports have been adopted or promulgated in an authoritative way by some official having power to bind the corporation by admission.

The collateral inheritance tax is held, in *Re: Lamb* (Iowa) 117 N. W. 1118, 18 L. R. A. (N. S.) 226, not to apply to property conveyed in possession and enjoyment in the owner's lifetime, to another in consideration of support to be furnished during the remainder of the owner's life.

A contract of insurance on furniture used in keeping a house of prostitution is held, in *Conithan v. Royal Ins. Co.* 91 Miss. 386, 45 So. 361, 18 L. R. A. (N. S.) 214, not to be against public policy.

In the Court of Common Pleas of Lackawanna County.

No. 558, January Term, 1907.

Rule for a New Trial.

Eugene F. McDonald vs. J. D. Williams & Brother Co.

Rule for Judgment Non Obstante.

Where A. & Co. conduct a store in which toys, household and various other goods are sold, and have the contents insured, the policies of insurance being on merchandise, their own, or on storage, or held in trust, or sold but not delivered, etc., and B, an individual, brings to the store for repair merchandise of a nature more or less similar to that handled by A & Co., which, on suggestion of A & Co. are sent directly to the factory in trunks bearing the card or tag of A & Co., and, after being repaired, are returned to the store of A & Co., who notify B of their arrival and request him to remove them, and B, neglecting to remove them promptly, they are destroyed by fire, together with other goods and merchandise of A & Co.; and B thereupon sues A & Co. for his proportionate share of the insurance money awarded and obtains a verdict on submission by the court to the jury of the question "whether the transaction between the parties was a mere matter of accommodation to B, or such as, in the regular course of A & Co.'s business, constituted a bailment;" A & Co. claiming that they made no charge for the transaction on their books, and B that he asked for his bill and offered to pay for the repairs.

In such a case the finding of the jury that as a matter of fact there was a bailment, will not be disturbed, and the terms of the insurance policies, covering goods "held in trust," are sufficient to cover and protect the bailor's property in the hands of A & Co., and it is immaterial whether the bailee so considered it, or whether such property of B was included in the inventory of the property destroyed, or whether the claim was refused by the insurance adjusters.

The cases of *Mittenberger v. Beacom*, 9 Pa. St., p. 198, and *Thomas & Sons v. Cummiskey*, 108 Pa. St., p. 354, cited and explained.

Mr. T. P. Duffy, for Plaintiff.

Messrs. Dean & Vosburg, for Defendant.

Opinion by Edwards, P. J., April 1909.

Plaintiff, in the trial of the above suit, claimed of the defendant the sum of \$313.70 for 119 pairs of skates and two trunks, entrusted to the care of the defendant and, subsequently destroyed by fire. Defendant conducts a large store in which confectionery, toys, house furnishings and many other goods and supplies are sold, the stock amounting to over one hundred thousand dollars. Plaintiff, in 1906, conducted a skating rink and he had a number of skates which needed repairing. Sometime in September, 1906, plaintiff came to defendant's store to see about the repairing of the skates. It was suggested to him that he send the skates direct to the factory, using the defendant's name; and he was

furnished with a tag bearing the firm's name. The skates, packed in two trunks, were sent to the factory, and in the course of time, were shipped to the defendant. Plaintiff was notified of the arrival of the skates and was requested to take them away. He failed to act promptly and while the trunks and skates were in defendant's store, the fire occurred, destroying the plaintiff's goods and a large part of the defendant's stock. The total inventory of the stock, at the time of the fire, was about \$148,000; the total value of the stock destroyed was about \$125,000; the total insurance was, approximately, \$94,600, and the total insurance money received by the defendant was about \$90,000. Defendant dealt in skates as a regular part of its business, and, so far as the character of plaintiff's goods is concerned, they were legitimately a part of the stock contained in the store. It appears that the skates and the trunks were not included in the inventory of the goods destroyed by fire, although the plaintiff could not help this fact; and it appears further, when a claim was made for the loss of the skates, that the insurance adjusters refused to allow the claim. Defendant claimed at the trial that no charge was made on its books against the plaintiff for the repairs on the skates. Plaintiff says he asked for the bill and offered to pay for the repairs.

The form of defendant's policies is in evidence. According to this form the insurance was "on merchandise, their own, or on storage, or held in trust, or sold but not delivered," etc.

Two questions were submitted to the jury:

First. Was the transaction between the plaintiff and the defendant a mere matter of accommodation to the plaintiff, or was it a transaction entered into in the regular course of business? Or, in other words, was the defendant a bailee of plaintiff's property?

Second. The value of plaintiff's property.

There can be no complaint as to the amount of the verdict, which is \$67.47 and interest. As to the first question the jury found against the defendant; and the jury was instructed that if it found the transaction to be of a regular business character and that the defendant was a bailee of the property, then, according to the terms of the policy the goods being "held in trust" the plaintiff was entitled to recover.

Under the foregoing facts should the verdict of the jury be allowed to stand? Or, should judgment be entered for the defendant, notwithstanding the verdict? We need not discuss the rule for a new trial. The record would not justify a new trial. The only point about which there can be any question is that which relates to the plan of co-insurance. The instructions of the court are not clear on this question; but they are just as clear as the evidence is. We have very little doubt that the jury took the evidence as to co-insurance into consideration in reaching a verdict.

The conclusion that the defendant was a bailee of plaintiff's property is established by the verdict of the jury; and once this fact is established we cannot escape the conclusion that the terms of defendant's policies are broad enough to cover the plaintiff's loss. The insurance policies cover not only the defendant's "own" merchandise, but merchandise "on storage," "or held in trust," "or on commission." If the defendant was bailee of plaintiff's property, then that property was "held in trust." It is no answer to say that the defendant did not so consider it; or, that the property was not included in the inventory of the property destroyed; or, that the insurance adjusters refused to allow the claim for the skates when made at a subsequent time. Defendant was plaintiff's trustee to the amount of plaintiff's proportionate share of the insurance received.

A general principle applicable to the present case is laid down in *Mittenberger v. Bacom*, 9 Pa., 198, to the effect that where an insurance is made generally by one having an interest and he receives the amount of the loss, another owner may recover from him on proving that the insurance was made on his interest, without showing a previous request to make the insurance. It may be contended that under this statement of the law the plaintiff is out of court. We think not. The verdict of the jury having established a bailment as to plaintiff's goods the insurance on defendant's stock unquestionably covered plaintiff's property, because it was property "held in trust" by the defendant. Plaintiff, therefore, had an "interest" in the insurance. Defendant contends also that no insurance money came into its hands to cover plaintiff's loss. It is true that the particular item of the skates and trunks were not included in the proofs of loss and that, in one sense, the defendant cannot

be charged with money "had and received" for and on account of the plaintiff; but the defendant received \$90,000 insurance for loss of merchandise, their own, or on storage, or held in trust. This was the contract under which the insurance companies paid the money to the defendant. Plaintiff's property was just as much a part of the defendant's stock as was its own merchandise, and the plaintiff is entitled to his pro rata share of the insurance. We may note here that the Mittenberger case is cited because of the general principle laid down and because its facts are the same as those of the case at bar.

We do not think the plaintiff ought to suffer because the defendant as trustee failed to do its duty. That the defendant was trustee for the plaintiff has been settled by the verdict of the jury. As to the relation of trustee and cestui que trust in such a case we quote from Justice Gordon's opinion in *Thomas & Sons v. Cummiskey*, 108 Pa., 354: "It was not the business of the cestui que trust to show that after paying all other claimants, there was enough left to cover her goods; on the other hand, it was the duty of the trustees to show how the money that came into their hands was, or ought to be, applied. They chose not to do so; hence, they were properly held to account to the plaintiff for the full amount of her loss." The Cummiskey case is interesting on the general question involved in the case at bar.

Other cases dealing with the questions before us are *Siter, et. al. v. Morris*, 13 Pa., 218; *Steele & Co. v. Insurance Co.*, 17 Pa., 290, and *Pittsburg Storage Co. v. Insurance Co.*, 168 Pa., 522.

Now, April , 1909, the rule for a new trial and the rule for judgment non obstante veredicto are discharged and we direct judgment to be entered on the verdict for the plaintiff.

Where a horse takes fright, without fault of the driver, at something for which the municipality is not responsible, and gets beyond the control of the driver, runs away, and comes in contact with some obstruction or defect in the street, which is there by the negligence of the municipality, it is held, in *McDowell v. Preston*, 104 Minn. 263, 116 N. W. 470, 18 L. R. A. (N. S.) 190, that the municipality is liable for the result of the injury if it would not have been sustained except for such negligence.

In the Court of Quarter Sessions of Lackawanna County.

No.

Sessions, 1909.

*In Re: Contested Election of Thomas F. Grady, School Director of
Fell Township.*

Contested Election. Time to File Bond. Construction of Statute.

In all cases of contested elections, the Act of Assembly requires that the petition must be supplemented by a bond which must be filed within ten days in order to be effective.

Where, in such cases, a bond, as required by Act of Assembly, is not filed in due time, the court on petition has no power or jurisdiction to order such bond to be filed "nunc pro tunc."

Where an Act of Assembly gives authority to court to proceed, or where the manner of obtaining jurisdiction over any matter is prescribed thereby, the court has no discretion. The statute is then mandatory and must be complied with.

Messrs. Brennan and Reedy, for Relator.

Messrs. Zimmerman and Lowry, for Respondent.

Opinion by Edwards, P. J., April , 1909.

The petition to contest the election in this case was filed March 17, 1909. We find that the act of 1899, P. L. 118, provides, inter alia, that whenever a petition is presented to the court to contest an election in such a case as the one now before us, it shall be the duty of the petitioners, within ten days thereafter, to file a bond for costs, and if said bond is not filed as provided in the act, that the petition to contest the election shall be dismissed. In the present case there is no bond filed yet. A motion is now made to fix the amount of the bond and to allow it to be filed as of the 27th of March, 1909. We have no power to make a nunc pro tunc order. The filing of the bond within ten days from the presentation of the petition is a condition precedent to the jurisdiction of the court. Where authority to proceed in courts of justice is conferred by statute, or where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must be complied with, or the proceeding will be entirely void.

The question before us has been discussed and decided in a well considered opinion by former judge, now Justice P. J. Stewart, in the case of Southhampton Township Election, 12 D. R., 141.

The motion to fix the amount of the bond and for leave to file the same is refused and the petition to contest the election in this case is dismissed at the costs of the petitioners.

A provision in an insurance policy to which is attached a slip making the loss payable to a mortgagee, that the conditions against alienation and change of possession shall apply "in manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," held in *Brecht v. Law Union & Crown Ins. Co.* (C. C. A.) 160 Fed. 399, 18 L. R. A. (N. S.) 197, not to prevent such provisions being applicable to the mortgagee, although the manner in which they are to be applied is not expressly stated in some writing indorsed upon or attached to the policy, ground that in the absence of special agreement endorsed on the policy, all its provisions apply as against a mere appointee of the right of the insurer to the proceeds.

A passenger who applies for transportation on a freight train is held, in *Olson v. Northern P. R. Co.*, 49 Wash. 626, 96 Pac. 150 18 L. R. A. (N. S.) 209, to have a right to rely on the evidence furnished him as to his right thereto; and to be entitled to recover damages from the carrier, if he is ejected from the train because of a mistake in such evidence, without fault or negligence on his part.

A trustee in bankruptcy of an insurance agent is held, in *Re: Wright*, 95 C. C. A. 206, 157 Fed. 544, 18 L. R. A. (N. S.) 193, to have a right, under the provisions of the bankruptcy act, to the commissions on the renewals as property which may be transferred, where his contract gives him such commissions for a term of years, and, in case of his death, gives them to his estate; although the contract is terminable by the company upon his failure to comply with its conditions.

In the Court of Common Pleas of Lackawanna County.

No. 230, September Term, 1907.

Rule to Open Judgment.

George Reed vs. Edward Reed.

Alteration of Note. Presumption of Regularity. Weight of Evidence.

Where A signs and delivers to B an ordinary printed form of promissory note, containing in writing the following clause varying the terms of the printed note, "This note is given to secure unpaid purchase money on real estate this day conveyed to me and to be paid in payments of two hundred and fifty dollars per year," and a judgment is entered against A on his default in making payment as required by the written varying clause in the note, the mere allegation of an alteration of the note after execution and delivery must be clearly shown.

In such a case the internal evidence, or the physical aspect and condition of the note itself and of the varying clause, may be taken into consideration and, in the absence of any clear proof to the contrary, may furnish evidence of the regularity and legality of the written, varying clause.

The absence of any testimony to explain away and destroy the regularity and legality of the written varying clause, together with the absence of any positive testimony that the written alteration took place after the execution and delivery of the note, is sufficient to cause the court to refuse a rule to open a judgment recovered against A on such note.

Mr. P. E. Kilcullen, for Plaintiff.

Opinion by Newcomb, A. L. J., April 26, 1909.

Judgment was entered May 23rd, 1907, against defendant on confession in his promissory note to his father, dated June 29th, 1906. The face of the note was \$1,500 00, payable with interest at 4% five years from date. The form was an ordinary printed blank. Above the signature lines a clause varying the terms of payment had been added in writing as follows: "This note is given to secure unpaid purchase money on real estate this day conveyed to me and to be paid in payments of two hundred and fifty dollars per year."

This is alleged by defendant to be an alteration of the note after its execution and delivery. The contest was brought on by plaintiff's attempt to collect by execution the sum of \$500 as for two installments. The fi. fa. was issued October 16, 1908, and was an alias writ. A prior execution had been stayed by plaintiff after a small amount had been collected by the sheriff, upon payment of costs by the defendant.

It is not denied that the note was given for the purpose stated in the disputed writing. It is agreed that the note was prepared by Mr. Aker-

ly, late a member of this bar, but now deceased, at his home in Clark's Summit, where it was executed. Apparently the disputed part is in the same handwriting as the undisputed, and indeed that is virtually admitted. The defendant, however, distinctly denies that this clause was in the paper at the time he signed and delivered it. If he tells the truth it would seem to follow that Mr. Akerly was a party to the alteration. It is only fair to say that such inference is wholly inconsistent with the latter's known good repute for professional integrity.

But we are forcibly persuaded against the defendant's credibility in the premises. The intrinsic evidence of the paper itself is not without some weight in its own favor. It was a form having two signature lines. The added words occupy nearly all the space above the first line. What was left is manifestly insufficient for a signature. The defendant wrote his name on the lower line. Looking at the note, without anything else, the natural inference would be that the signature was put there because there was no other place for it by reason of the insertion of the clause in question. In other words, the signature is just where it would have to be if the note was in its present condition when it was executed. It is not where it would naturally be if both signature lines were intact at that time. He has suggested no reason for choosing that in preference to the first line, and the circumstance is more consistent with the genuineness of the note as it now appears than with the theory of alteration.

But on the positive testimony he fails to make out a case for the relief asked for. He is emphatically contradicted by his father. The only living witness present at the time is his brother whom he calls on his behalf. The brother gave a similar note at the same time and for the same purpose, viz: to secure the purchase money for land then conveyed to him by the father. His testimony furnishes no substantial corroboration of that of the defendant. The latter stands, therefore, alone and flatly contradicted by the other party to the note. In that state of the evidence there is nothing to submit to a jury, much less to move the conscience of a chancellor.

The rule to show cause is discharged.

In the Court of Quarter Sessions of Lackawanna County.

No. 804, October Sessions, 1908.

Motion for Approval of Exceptions.

In Re: Public Road in Scott and N. Abington.

Report of Viewers. Exceptions.

Where viewers are appointed to view and lay out a public road, exceptions to the report having been first regularly filed, and additional exceptions are filed after the regular time, without leave of court, such additional exceptions will not be permitted to be filed "*nunc pro tunc*" on motion, when they raise issues *dehors* the record.

Mr. Fred C. Haynen, for Exceptions.

Mr. A. A. Chase, contra.

Opinion by Newcomb, A. L. J., April 26, 1909.

The order for this view was returnable to the December Sessions last year. Report was regularly filed and confirmed *nisi* December 10, 1908. Exceptions were regularly filed January 28th, 1909. Under the rule the time in which they could be filed expired February 1st, this year. March 1st additional exceptions on part of the same exceptant were filed. That was done without leave of Court, and recently this motion was made for leave to have them marked filed *unc pro tunc* as of February 1st.

They are five in number. Four raise, or seek to raise, questions *dehors* the record. According to the weight of authority exceptions of that nature will not be allowed *nunc pro tunc*.

18 P. & L. Dig., Dec., 30912.

The emaining exception goes to matters of record, but such as were already involved in the exceptions which were filed in time.

The remaining exception goes to matters of record, but such as exceptions are stricken off.

An accident insurance company is held, in *Gatzweiler v. Milwaukee Elec. R. & L. Co.* (Wis.) 116 N. W. 633, 18 L. R. A. (N. S.) 211, not to become subrogated, upon paying a loss, to the rights of the policy holder against the one negligently causing the accident, in the absence of a provision to that effect in the policy.

In the Court of Common Pleas of Lackawanna County.

No. 10, September Term, 1908.

Rule to Open Judgment.

The Reddington Co. vs. Nelia Bellamy.

Bailment. Measure of Proof to Open Judgment. Burden of Proof.

A agrees to deliver to B certain merchandise on bailment at a certain rent payable in instalments, a certain period upon full payment whereof the absolute title would rest in B.

B, on the trial, contended that, before the goods were delivered, the agreement was rescinded and another contract, the terms of which had been fully complied with, substituted in lieu thereof, and that, having purchased other goods subsequently on personal credit and without any written contract, A was seeking to hold B on contract rescinded by agreement and that the note was altered as to its date and the description of the goods leased, so as to make it appear to be a lease for merchandise last purchased.

In such a case, where plaintiff, on rule to open judgment, makes a responsive answer to defendant's allegations, the rule will be refused.

The burden of proof is on the defendant, who must make out a clear case to be entitled to any relief.

Mr. T. P. Hoban, for Plaintiff.

Messrs. J. J. Powell and John P. Quinnan, for Defendant.

Opinion by Newcomb, A. L. J., April 26, 1909.

The judgment here is founded on a confession in a written instrument. The writing purports to be a contract of bailment whereby payable in instalments as therein specified, upon full payment whereof payable in instalments as herein specified, upon full payment whereof title was to be transferred. The genuineness of defendant's signature is not denied. It is, however, alleged by her that before the contract was consummated by delivery of the goods, it was rescinded by agreement of the parties and another writing substituted in its place, the terms of which have been long since fully performed on both sides. It is also alleged that having occasion at a later time for other goods she bought them from plaintiff on her personal credit alone without any writing whatsoever, and that now taking advantage of the first paper, which had remained in its possession since the rescission, the plaintiff has fraudu-

lently altered it in respect to its date and the description of the goods so as to make it appear to be a lease for the goods last purchased.

These allegations are distinctly denied by plaintiff's answer. Thus the burden of proof according to the rules governing proceedings in equity is cast on the defendant.

The witnesses in her behalf fail to corroborate her testimony which, therefore, stands alone. Needless to say this is sufficient to overcome a responsive answer, and the relief asked for cannot be granted.

The rule to show cause is discharged.

One undertaking to provide a home for another during life in consideration of his promise to convey certain property to her at his death is held, in *Newman v. French* (Iowa) 116 N. W. 468, 18 L. R. A. (N. S.) 218, not to be entitled to a specific performance of the promise to convey prior to the death of the promisor, since she has not performed the consideration.

The giving of a check for a debt is held, in *Senniger v. Rowley* (Iowa) 116 N. W. 695, 18 L. R. A. (N. S.) 223, to be an acknowledgment to toll the statute of limitations, although the check is subsequently returned and the debt permitted to stand.

A municipal ordinance forbidding a solicitation of business from passengers entering or leaving a railroad station is held, in *Seattle vs. Hurst*, 50 Wash. 424, 97 Pac. 454, 18 L.R.A.(N.S.) 169, to be a valid exercise of the police power, and not unconstitutionally to impair an existing contract between a railroad company and a transfer company giving it the right to solicit such business within the depot grounds.

One lacking testamentary capacity is held, in *Re Goldsticker*, 192 N. Y. 35, 84 N. E. 581, 18 L.R.A.(N.S.) 99, not to be competent; by means of an attempted testamentary act, to revoke a prior will.

In the Court of Common Pleas of Lackawanna County.

No. 1555, September Term, 1907.

Rule for Judgment Non Obstante Veredicto.

*S. J. Holgate vs. The Great Eastern Casualty & Indemnity Company
of New York.*

*Casualty Insurance. Liability of Insurer. Construction of Terms of
Policy. Discussion of Principles and Cases.*

A, who is insured in a Casualty, or Accident Insurance Company, in driving a horse and buggy along a road, attempts to close a gate through which he had passed. While still on the ground he calls to his horse to start up, and, as the horse begins to run, A seizes the lines, grasps the side of the buggy, and attempts to re-enter the buggy. He reaches the step with one foot, then slips, continues to run alongside the buggy in further effort to stop the horse, and finally strikes his foot against an obstruction on the ground and sprains his ankle. There is no issue of contributory negligence on the part of the plaintiff raised by the defendant company at the trial of the case, and the policy, which was in force at the time of the accident, provides, *inter alia*, that A, the insured, shall be entitled to indemnity if he is injured "while riding within a conveyance drawn by horse power."

On these facts a verdict is given in favor of the plaintiff, subject to a point of reserved law whether under all the facts agreed upon and incorporated in the special verdict, the plaintiff is properly entitled to recover.

In such a case, plaintiff is justly entitled to indemnity, and the rules of strict construction of the words "riding within a conveyance" are not applicable.

A fair construction of the law, under the facts, would give the same legal effect and meaning to the expressions "riding within a conveyance drawn by horse power" and "traveling by a conveyance drawn by horse power."

A contract of insurance must be interpreted reasonably and in view of what was contemplated by the parties when he entered into and where the terms of such a policy are, without violence, susceptible of two interpretations, that construction is adopted which favors the insured.

Messrs. Vosburg & Dawson, for Plaintiff.

Mr. W. L. Hill, for Defendant.

Opinion by Edwards, P. J., April, 1909.

This is a suit upon an accident insurance policy. A verdict for sixty dollars was taken in favor of the plaintiff subject to the point of law reserved whether under the facts agreed upon and incorporated into a special verdict the plaintiff is entitled to recover.

The policy under which the plaintiff was insured bears date April 2, 1907. It provides, *inter alia*, that if the insured is injured "while riding within a conveyance drawn by horse power" he shall be entitled

to indemnity. While the whole policy is made a part of the special verdict, the clause just quoted is the only one which concerns us in this case. There is, of course, no question of contributory negligence on the part of the plaintiff to be considered.

The plaintiff was injured on July 9, 1907, sustaining a sprained ankle, and was wholly disabled for four weeks. The manner of the accident is given with precise particularity. Plaintiff drove a single horse to a buggy, to Luna Park. He got out of the buggy to close the gate to the park, and while he was standing on the ground he told his horse to start up, so that the gate could swing clear of the buggy. The horse started to run and the plaintiff grabbed the side of the buggy with his left hand and the lines with his right hand and attempted to climb into the buggy, but succeeded only in getting one foot on the step from which his foot slipped almost immediately. Plaintiff then ran alongside the buggy, trying to stop the horse, and was thrown by striking his foot against some obstruction on the ground, spraining his ankle.

Counsel for the defendant in his argument adheres closely to the letter of the text. He is a "strict constructionist." He maintains that it clearly appears the plaintiff was not "riding within a conveyance;" nor was he "getting on a conveyance" when the accident happened. He was not riding, because he was *running*. He was not within a conveyance, because he was running *on the ground*. He was not getting on a conveyance, nor even trying to, because he was running on the ground *trying to stop a horse*.

We are impressed and almost persuaded against our own judgment by the pertinency of counsel's argument. We quote a part of it: "To hold that a person running on the ground trying to stop a horse to which a vehicle happens to be attached, can be said, in any sense of the words, to be riding within that vehicle, would be not only a violation of every known rule of construction, but an absurd distortion of plain, simple, common, every-day words into a meaning that they never have had and never will have. It is almost inconceivable that the court could seriously be asked to reach out its hand and by sheer force of judicial construction pick up a man running on the ground and put him into a buggy, or be expected to say of a man who was *running* on the

ground *beside* a vehicle, that he was really doing nothing of the-sort, but was in fact *riding within* that vehicle."

Notwithstanding this argument we have reached the opposite conclusion and hold that the plaintiff's verdict ought to stand. In construing the phrase "riding within a conveyance" too much stress should not be laid on the word "within." If the word is given its narrowest or literal meaning the plaintiff could not recover had he stepped from the step when attempting to enter the buggy or when getting out of the buggy. In neither case would he be "within" the conveyance. Why is it not a fair construction to give the phrase "riding within a conveyance drawn by horse power" the same effect that is given to the phrase "traveling by conveyance drawn by horse power?" There are several cases in which the phrase "traveling by public or private conveyance" is construed. If we are correct in saying that the plaintiff in the present case is protected by his policy to the same extent as he would be if the clause in the policy read "traveling by private conveyance," then we apprehend that the plaintiff's contention ought to be sustained.

A contract of insurance must have a reasonable interpretation, such as probably was in the contemplation of the parties when it was made, and where the terms of a policy are susceptible, without violence, of two interpretations, that construction which is most favorable to the insured should be adopted.

Defendant's counsel relies to some extent on the case of Ripley, Admx., v. Ry. Pass. Assurance Co., 83 U. S., 336. The facts of this case are very different from those of the case at bar. In the Ripley case the insured, after purchasing a ticket, proceeded by steamboat to a village about eight miles from his residence, and from that village he walked home. While on his way he received injuries by violence and died. The supreme court held he could not recover. We see no consolation for the defendant in this decision.

A case that is more in point and may be considered as sustaining plaintiff's contention is that of Northup v. Ry. Pass. Assurance Co., 42 N. Y., 516. In this case a clause in the policy provided indemnity to the insured for an accident "while traveling by public or private conveyance provided for the transportation of passengers." The facts of this case are more fully given in the opinion of the court below (2

Lansing, 166.) It appeared that Mrs. Northup began her intended journey, in company with her husband and others, by rail to Watkins, at the head of Senaca Lake. From Watkins they went by steamboat to Geneva, where they arrived about eight o'clock in the evening. On landing at the steamboat wharf the party started on foot to go to the station of the N. Y. C. R. R. Co., about seventy rods from the wharf, and on the way from the wharf to the station Mrs. Northup slipped and fell upon the sidewalk, receiving injuries from which she died in a few days. It appeared also that upon the arrival of the steamboat there were public hacks for hire at the wharf, for the purpose of conveying passengers, if hired to do so, to any part of said village, or to the railroad station. Mrs. Northup was injured while she was walking on the sidewalk. She was, it is true, proceeding on a continuous journey, but clearly, in a literal sense, she was not traveling by any kind of conveyance when she was injured. The court below held that as she was not traveling by "conveyance" she was not entitled to indemnity. The Court of Appeals, taking a broader view, reversed the court below and entered judgment for plaintiff for \$5,000.

In the case of *Champlin v. The Ry. Pass. Assurance Co.*, 6 Lansing, Sup. Ct. N. Y., 71, plaintiff attempting to jump on to a moving omnibus by the rear step, slipped, injuring his knee against the wheel. He was allowed to recover. In the opinion we find the following language used: "The only remaining question is, was the plaintiff traveling when the accident happened? He was in the act of getting into a public conveyance for that purpose, and was injured while upon the outside step thereof. It would be a very strained construction of a contract like to hold that he was not traveling. If he was not traveling it is difficult to say what he was doing. We think that as he was actually going from one place to another, he was traveling."

Other cases might be cited along the line of the *Champlin* case. We have not found any involving an interpretation of the exact words of the clause in plaintiff's policy in the case at bar. We do not think our construction of the clause a strained one. We notice another clause in the policy to this effect: "Traveling as a passenger in a place regularly provided for passengers, *within* a horse-car, omnibus, etc." In our judgment this means the same as traveling by horse-car, omnibus,

etc. It describes a means of travel, or the kind of conveyance in or by which a journey is made. In the case now before us the plaintiff traveled by private conveyance or within a conveyance, both expressions meaning the same thing. For a part of his continuous journey he certainly was within the conveyance. Whether or no he did a wise thing in stepping out of the buggy to close the gate and ordering his horse to move on is immaterial because the plaintiff's negligence is not an element in the case. He tried his best to get "within" the buggy. He had his foot on the step and slipped; but he continued his effort to get "within the conveyance," and while running with this end in view his foot struck an obstruction and he was injured.

The rule for judgment non obstante veredicto is discharged and we direct judgment to be entered on the verdict for the plaintiff for the sum of sixty dollars, with interest from date of verdict.

The right of a city to remove a person afflicted with a communicable disease, dangerous to public health, into an adjoining town without the consent of the latter's health officer, is denied in *Summit Twp. v. Jackson* (Mich) 117 N. W. 545, 18 L. R. A. (N. S.) 260, under charter authority to provide hospitals either within or without its limits, to which persons having contagious diseases may be removed when the public safety may so require, and to quarantine persons so affected within or beyond the city limits; where the general health laws permit townships to obtain quarantine ground without their limits with the assent of the township within whose limits it may be established, and provide that no person affected with a communicable disease dangerous to public health shall be brought into any township without a permit from its health officer, and that these provisions shall apply to all cities, except in cases where their charters contain provisions inconsistent therewith.

The right of the court to surcharge an executor's account for overpayment of counsel fees without an exception by some interested person before it, is denied in *Re: Sitzel*, 221 Pa. 227, 70 Atl. 749, 18 L. R. A. (N. S.) 284.

In the Court of Quarter Sessions of Philadelphia County.

No. 12, February Sessions, 1909.

Commonwealth v. Levin et al.

Motion to Quash Bill of indictment.

Criminal Law. Conspiracy. False Pretences. Variance Between Information and Indictment.

Where the information, upon which the warrant was issued, charged that the defendants "did obtain money from this deponent fraudulently and with intent to cheat and defraud this deponent, and continue to fraudulently withhold the same from him unjustly, without stating any reason therefor, and against the law of the state," and the return of the magistrate was "Defendants charged with conspiracy to cheat and defraud by false and fraudulent representations," Held, that an indictment for conspiracy to cheat and defraud, being the offence for which the defendants entered bail, should not be quashed.

Samuel J. Gottesfeld, for Motion.

John M. Patterson, assistant district attorney, Contra.

Opinion by Staake, J., April 14, 1909.

Four reasons are filed in support of the motion to quash the bill of indictment found against the defendants:

1. That the bill in the above case was found contrary to the laws of the commonwealth of Pennsylvania.

2. Because the indictment does not conform with the information upon which the warrant was issued, in that the indictment charges the defendants with conspiracy to defraud, whereas the information upon which the warrant of arrest was issued by Magistrate O'Brien charged each of the defendants with obtaining money on false pretences.

3. Because the bill in the above case was found improperly, illegally and unlawfully by the grand jury.

4. Because the information discloses no criminal offence.

On the argument of the motion, the learned counsel for the defendants based his contention principally upon the ground that the bill found was for a conspiracy not averred in the information or affidavit sworn to by Harry Cosinsky, Dec. 17, 1908, before Annette Smith, a notary public, on which the warrant was issued Jan. 5, 1909, for the arrest of the defendants.

The gist of the offence charged in this affidavit, after reciting the facts, is that the defendants "did obtain money from this deponent fraudulently and with intent to cheat and defraud this deponent and continue to fraudulently withhold the same from him, unjustly, without any reason therefore, and against the law of the state."

The return of the proceedings before John M. O'Brien, magistrate of court No. 12 in Philadelphia, states: "Defendants charged with conspiracy to cheat and defraud by false and fraudulent representations, of \$150."

The prosecutor appears to have been the only witness in the case. What his testimony was before the magistrate does not appear, but it does appear that the defendants were held in the sum of \$800 each for their appearance at court to answer the charge of conspiracy, and that it was for this offence they were subsequently indicted by the grand jury. We are not now concerned with the question as to whether, upon a trial of the defendants upon the indictment found against them, the evidence will warrant their conviction, but we are confined to the question whether, upon the face of the record in the case, the indictment thus found must be quashed because it is averred it is not warranted by the facts set out in the affidavit upon which the warrant was issued by the magistrate.

The return shows the charge upon which the defendants had the hearing before the magistrate was "conspiracy to cheat and defraud by false and fraudulent representations." They did have a preliminary hearing upon that charge, and the contention of the counsel in support of the motion "that the crime charged in the bill of indictment, being different from the crime with which the defendants were charged at the hearing before the magistrate," is contradicted by the return of the magistrate.

The evidence satisfied the magistrate that a *prima facie* case of conspiracy had been proved. While the court has a right to consider the information upon a motion to quash an indictment for matters that do not appear upon the face of the indictment, it does not follow that if the evidence submitted to the magistrate warranted his holding the defendants under bail to answer the charge of "conspiracy," they should not be indicted for said conspiracy.

While we are by no means convinced that the facts averred by the prosecutor in his affidavit may not be sufficient to warrant the charge of conspiracy to cheat and defraud, the question now before the court is: Can the defendants be indicted by the grand jury for the offence for which they entered bail before the magistrate to answer at court?

It was upon this charge they had the hearing, as shown by the magistrate's return already referred to. The information averred the joint action of all of the defendants, joint promises, joint representations and a joint wrong committed to his injury.

If the evidence satisfied the magistrate there was an unlawful combination of the defendants to cheat and defraud the prosecutor, he was warranted in holding them to answer the offence charged; the grand jury was not acting "improperly, illegally and unlawfully" in finding an indictment for the offence charged in the return of the magistrate.

The motion to quash the bill of indictment is refused.

Under a statute permitting a court of probate to appoint commissioners to examine and adjust all claims and demands against a deceased person, it is held, in *Martin v. Thison* (Mich.) 116 N. W. 1013, 18 L. R. A. (N. S.) 257, that the court may allow against the estate claims for alimony which accrued between a divorce decree and the remarriage of defendant's wife, and not be precluded from so doing by the fact that jurisdiction over decrees for alimony is, by statute, vested in a chancery court.

The owner of property lost while in a railroad check room is held, in *Terry v. Southern R. Co.* (S. C.) 62 S. E. 249, 18 L. R. A. (N. S.) 295, not to be bound to show negligence on the part of the railroad company, to be entitled to hold it liable for the loss.

The right of a father to hold one negligently causing the death of his child liable for the loss of the value of his services between the time of death and his majority is denied in *Stevenson v. W. M. Ritter Lumber Co.* (Va.) 62 S. E. 351, 18 L. R. A. (N. S.) 316.

In the Court of Common Pleas No. 1, Philadelphia County.

No. 3858, December Term, 1908.

Rule to Dissolve Attachment.

Antreason v. Samarsien.

*Wages. Attachment for Board. Act of April 10, 1905. Art. iii., sect.
7, Constitution.*

The Act of April 10, 1905, P. L. 134, providing for the attachment of wages for boarding or lodging, is in conflict with art. iii, sec. 7, of the constitution, which forbids special legislation changing the methods for the collection of debts.

H. Roberts, for Plaintiff.

Sellers & Rhoads, for Garnishee.

Appeal from the judgment of a magistrate in a suit by the proprietor of a boarding-house to recover four weeks' board, begun, under the Act of April 10, 1905, P. L. 134, by summons and attachment against defendant's wages in the hands of his employer, the Pennsylvania Railroad Company. Defendant petitioned the court to dissolve the attachment, alleging the unconstitutionality of the Act of 1905.

The Act of 1905 violates art. iii, section 7, of the constitution, which forbids special legislation "changing methods for the collection of debts or the enforcing of judgments:" *Vulcanite Portland Cement Co. v. Allison*, 220 Pa. 382; *Vulcanite Paving Co. v. Philadelphia Rapid Transit Co.*, 220 Pa. 603; *Tennessee Producers' Marble Co. v. Grant*, 14 Dist. R. 453.

Per Curiam, March 5, 1909.—Rule absolute, on authority of *Vulcanite Portland Cement Co. v. Allison*, 220 Pa. 382.

The occupation of a street by the construction of a permanent improvement at a point 88 feet from the premises fronting thereon, with the result that pedestrian travel on that side of the street is diverted in other directions, is held in *Fitzer v. St. Paul City R. Co.* (Minn.) 117 N. W. 434, 18 L. R. A. (N. S.) 268, to constitute an interference with the natural property rights enjoyed by the owner.

In the Court of Common Pleas, No. 5, Philadelphia County.

No. 4628, March Term, 1907.

Collins v. City of Philadelphia.

*Motion for Judgment for Defendant Non Obstante Veredicto and Rule
for New Trial.*

Negligence. Sidewalks. Infants. Roller Skating.

A municipal corporation owes a duty to children to keep its sidewalks free from holes, pitfalls or obstructions, where it is known that the sidewalks are used by them for roller skating, and such use is not prohibited by ordinance, regulating or custom, and has been tolerated by the city officers.

Thomas A. Fahy, for Rule.

Robert Grannan, Contra,

Trespass against the city of Philadelphia for negligence, in consequence of which the plaintiff, a girl of fifteen years, while skating, about eight o'clock in the evening, upon roller skates upon a sidewalk, so used by children, fractured her hip by reason of her skate becoming fastened in a hole or water-box in the pavement. A verdict was given of \$7,500 for the child and \$2,000 for her father.

Per Curiam, March 3, 1909.—The motion of the defendant for judgment *non obstante veredicto* must be refused and the rule for a new trial be discharged.

On the questions of the contributory negligence of the plaintiff, Catharine Collins, and of the measure of damages the case was carefully submitted to the jury by the trial judge. The contention of the defendant that the municipality did not owe any duty to the plaintiff, Catharine Collins, a girl of fifteen years, while using the sidewalk on roller skates, and that its only duty is to use due and proper care to see that its sidewalks are reasonably safe for pedestrians exercising ordinary care and prudence cannot be sustained. While it is true that the city is not an insurer against accidents, and that every defect therein, though it may cause the injury sued for, is not actionable, it is also true that the obligation of the road supervisors, under the general law, to keep the highways clear of all impediments to easy and convenient passing and traveling, becomes equally the obligation of a municipal cor-

poration accepting a charter investing it with the care of the highways within its borders. The plaintiff, while not a pedestrian in the ordinary sense of the word, appears from the testimony to have been going from her playground to her home, passing along the sidewalk of Daly street east toward Second street, at the corner of which streets she lived with her parents. It is true that she was upon roller skates, but it was not evidenced that the use of roller skates upon a sidewalk is prohibited by any existing ordinance, rule, regulation or custom of the city. It was not contended that the officers of the city prevented such use so long as the rights of others being upon or passing along the street were not prejudiced thereby. If the known use of the sidewalks of the city for such amusement, physical exercise and healthful development, has not been forbidden by ordinance, but has been tolerated by the officers of the city, how can it be said that the city owes no duty to the person upon the sidewalk to see that it is free from holes, pitfalls, open ditches or obstructions equally dangerous to a person walking, running or using roller skates in moving along such sidewalk?

It is undoubtedly the practice in this commonwealth that, in crowded cities, the use of the streets for pleasure and sometimes even for the promotion of health may be regarded as a public necessity. Until playgrounds are provided for the children of large cities, are they to be confined to the house or restricted to the small back or side yard, where such exist, or are they to be allowed the benefit of the light, air and exercise found in innocent play upon the sidewalks, so long as they do not in so doing interfere with the rights of others using the sidewalks?

In *Weida v. Hanover Township*, 30 Pa. Superior Ct. 424 (1906), a municipality allowed a pool of water impregnated with acid to remain near a sidewalk. A child at play fell in and was killed, and her parents were allowed to recover.

In *Kreiner v. Straubmueller*, 30 Pa. Superior Ct. 609 (1906), the court said: "It was not unlawful for the children to play in the street and it cannot be said they had no business there."

See, also, *Addis v. Hess*, 29 Pa. Superior Ct. 505, as to the right of children to play upon the highway, and that we are bound to take notice of their instincts and their propensity to play and follow their natural impulses.

It was not shown that the plaintiff's use of the sidewalk went to the extent of preventing the public having the right of travel over it. We are of the opinion that the municipality owes some duty to every one using its streets, even though the method of the use may be unusual or even dangerous.

We believe the case was properly submitted to the jury, and that the amount of damages found for the plaintiffs was not excessive under the circumstances.

The liability of a railroad company for injury to an employee by the placing of a car loaded with explosives about the middle of the train, back of cars controlled by air brakes, and the stopping of the train by the use of such brakes, and the effect of the inertia of the cars so controlled on the following ones, which results in overturning and explosion of the car, is denied in *Lewis v. Pennsylvania R. Co.* 220 Pa. 317, 69 Atl. 821, 18 L. R. A. (N. S.) 279, on the ground that the placing of the car and the use of the brakes were acts of fellow servants of the injured employee.

Upon the election of a widow to take her dower and distributive share, the value of which exceeds the value of a life interest given her by the terms of her husband's will, it is held, in *Holdren v. Holdren*, 78 Ohio St. 276, 85 N. E. 537, 18 L. R. A. (N. S.) 272, that the remainder in such life interest will not be accelerated, but that the widow's life estate will be sequestered to compensate the disappointed devisees.

The admissibility of defense of an action by a receiver of an insolvent corporation to enforce a promissory note executed in his favor, of evidence that the note was delivered on condition that the signature of the corporation should be procured and delivered to the maker within a specified time, and that the condition had not been performed, is sustained in *Beach v. Nevins* (C. C. A.) 162 Fed. 129, 18 L. R. A. (N. S.) 288.

In the Orphans' Court of Philadelphia County.

No. 84, January Term, 1908.

Entermann's Estate.

Exceptions to Adjudication.

Legacies. Interest from Testator's Death.

A provision in a bequest of income for life that the legatees, upon their attaining, or upon other persons attaining, a certain age, shall also be paid the principal and will not deprive them of interest from the date of the testator's death.

Gustavus Remak, Jr., for Exceptant.

Henry J. Rebman, contra.

Opinion by Anderson, J., March 6, 1909.

The testator bequeathed six funds in trust, to pay the income of three of the funds respectively to A, B and C for life and the principal to others; and, as to the fourth fund, to pay the income to D and also the principal upon her attaining a certain age; and, as to the two remaining funds, to pay the income to E and F respectively and also the principal upon their children attaining a certain age.

The auditing judge (Dallett, J.) awarded interest from the date of testator's death to be paid to each of the legatees, citing Robinson's Estate, 16 Dist. R. 31. To the award of interest, exceptions were taken.

A distinction is sought to be made by the exceptions in this case as to the payment of the income for the year after the testator's death; between trusts than run for a certain number of years, or to a certain period, and those for life of the *cestuis que trust*. It is admitted that under the authorities a *cestui que trust* for life is entitled to the income from the death of the testator, but it is argued that where the trust is for a shorter period and the estate is finally to pass into the hands of the beneficiary, that to enforce the same rule as in the case of the life tenant would work inequality as against those who take an estate freed from the trust; but the argument fails of force when we reflect that there is in any case no such equality; for while it is true if the beneficiary live to the age or the number of years indicated, he or she will get the estate and in the meanwhile have enjoyed the income from the gift for a year more than he who gets his gift absolutely; yet, on the other hand, he who gets an estate absolutely runs no risk of it going

over to some one else in the event of his or her death prior to an end of a trust, but owns it at once on the death of the testator, and can do what he pleases with it. Moreover, the argument fails to take cognizance of the reason upon which the rule that annuities and trust estates begin to produce interest from the death of the testator is founded and that is that the tesaor who gives the annuity or income of a fund does so that his beneficiary might have a certain income, usually for his support and maintenance, coming in periodically from his donation, and it is not to be supposed that it was his intention to deprive the beneficiary of his annuity or income for a year to the benefit of his residuary legatee. This is the doctrine of a line of cases summed up in Flickwir's Estate, 136 Pa. 374, which has been followed by Eichelberger's Estate, 170 Pa. 242; Brown's Estate, 190 Pa. 464, etc.

This being the reason for the rule, why is it not just as strong in estates limited for a time as in life estates? In the former case, the *cestui ue trust* gets nothing but the income until the end of the trust, and is just as much in need of the income until that time shall arrive as though the trust should continue until his death, as indeed it may. The testator's thought was to care for the beneficiary at the beginning of the trust, and if that be so, its limitations can have no effect to modify it. This is the logic in Robinson's Estate, 16 Dist. R. 31; and we see no cause to disturb it; nor does the fact that the legatee came of the age designated during the year stop the running of interest, as that was the time fixed for the payment of the legacy, and interest runs from it, as it is only in the absence of a time fixed that the law fixes a year after the death: Schall's Estate, 17 Dist. R. 471; Koon and Wright's Appeal, 113 Pa. 621.

We do not think that it follows that the legacies given absolutely, but in which the direction "is to pay as soon as may be," are entitled to interest from the death. Not only is there authority against it (Morris's Estate, 3 Pa. C. C. Reps. 191), but if these words means anything, they mean that the time of the payment shall be left to the discretion of the executor. In other words, *as soon as may be* is used in the sense of *as soon as safely may be*, and as a matter of law that safety does not come until after the year in which the claims of creditors are to be made; but an executor can pay before at his risk. Interest runs from the date

that payment should be made, and when that is left to the discretion of the executor and he makes no payment until the year is up, surely interest cannot accrue in the meanwhile because it turned out that he might have paid it at once without loss. With still less force can the claim be made where, as in this case, the sufficiency of the estate grew out of the fact that the securities of which it was composed increased in value during the year in which the executor delayed the payment of the legacies.

Exceptions dismissed.

A promise by a landlord to pay his tenant for a betterment placed on property by the tenant, and which he had a right to remove, but which the landlord accepted, is held in *Critcher v. Watson*, 146 N. C. 150, 59 S. E. 544, 18 L. R. A. (N. S.) 270, not to be without consideration, and to be binding upon him.

A vote of the directors of an amusement association that a certain person be given the ice cream privilege for a certain time at a certain price per year is held, in *Hazard v. Hope Land Co.* (R. I.) 69 Atl. 602, 18 L. R. A. (N. S.) 293, not to be a completed contract, violation of which can be prevented by injunction.

The liability of a railroad company for the act of its servant sent to erect a snow fence on the property of an abutting owner in assaulting a servant of the latter to prevent his interfering with the prosecution of the work or demolishing work already completed is sustained in *Waller v. Great Northern R. Co.* (S. D.) 117 N. W. 140, 18 L. R. A. (N. S.) 297.

Amendments to the pleading which involve a new trial are held, in *Todd v. Bettingen*, 102 Minn. 260, 113 N. W. 906, 18 L. R. A. (N. S.) 263, not to be allowable for final decision on appeal, except possibly, in extraordinary cases, and then only when the proposed amendment sets forth clearly and distinctly a basis for relief which has not before been presented for judicial determination.

In the Court of Common Pleas of Lancaster County.

No. 17 April Term 1908.

Rule for Judgment for Want of Sufficient Affidavit of Defence.

HERR VS. SHOFF.

In an action by a vendor to recover the price of goods sold and delivered, an affidavit of defence which avers that he did not buy any goods from the plaintiff, but that he dealt with one alleged in the statement to be the plaintiff's agent, as the owner, without knowledge of the agency and with the understanding that a bill owed to him should be set off, is sufficient as to the whole of plaintiff's demands, although the set-off only covers part of the demand, and the affidavit is vague and unsatisfactory in other parts.

Geroge Ross Eshleman, Attorney for rule.

H. Frank Eshleman, Attorney, contra.

Opinion by Landis, P. J., June 27, 1908.

The suit was brought in this case to recover a book account of \$323.67 for lumber claimed to have been sold by the plaintiff's agent to the defendant. The defence is that Shoff never purchased any lumber from the plaintiff, and while he did buy the lumber from J. Adam Alexander, he never heard Herr's name mentioned in the transaction until at least two and one-half years after the purchase was made. It is also asserted that Alexander was indebted to the firm of Shoff & Brother, of which Frederick Shoff was a member, in the sum of about \$250; and it was agreed that lumber furnished should be credited on this indebtedness; and that more than a year and a half after "the goods were received" Shoff was instructed by Alexander to pay the difference between the bill for the lumber and the account due Shoff & Brother to the plaintiff, on account of certain moneys owing by Alexander to Herr. Shoff asserts that he sent Herr a note "for \$109, more or less," which Herr was unable to discount, and he therefore returned it.

Conceding the truth of the affidavit of defence, it is clear that Shoff is indebted to some one for a balance due upon this lumber. Under it Alexander could demand a judgment at least for this sum. But Herr is in a different position, as he was no party to the original transaction, and can only recover as Alexander's transferee. He has not sued as such, but as the original seller, through his agent, of the whole bill. Therefore, while the affidavit of defence is vague

and unsatisfactory in parts, we think there is, nevertheless, sufficient set forth to prevent the entry of judgment. If Herr sold no lumber to Shoff, then, under the statement, he cannot recover. If, after the sale, Alexander transferred the account to Herr, the claim can be recovered under the transfer. That issue, however, is not now presented by the pleadings.

We think the rule should be discharged. Rule discharged.

A private corporation owning a mill operated by steam power and having for its purpose the manufacture and sale of flour and feed is held, in *Howard Mills Co. v. Schwartz Lumber & C. Co.* (Kan.) 95 Pac. 559, 18 L. R. A. (N. S.) 356, not to be entitled to exercise the right of eminent domain for the purpose of improving and enlarging the business.

An erroneous instruction withdrawing from the consideration of the jury in a criminal case the minor grades of the offense is held, in *Montgomery v. State* (Wis.) 116 N. W. 876, 18 L. R. A. (N. S.) 339, not to be an acquittal of them which will sustain a plea of former jeopardy upon a subsequent trial.

A defense of fraud in procuring a subscription to stock of a corporation is held, in *Marion Trust Co. v. Blish* (Ind.) 84 N. E. 814, 18 L. R. A. (N.) 347, not to be prevented in an action by a receiver on the subscription note, based on the title of the corporation thereto, because the rights of some of the corporate creditors attach subsequently to the making of the note.

A municipal corporation is held, in *Neff v. Cameron* (Mo.) 111 S. W. 1139, 18 L. R. A. (N. S.) 320, not to be relieved from liability in an action by a child injured by a defective sidewalk for the condition of which it is responsible, because of the negligence of its parent in taking it upon such walk, and in failing properly to care for the wound after the injury results.

In the Court of Common Pleas of Lackawanna County.

J. G. Huffnagle vs. Delaware & Hudson Canal Company.

No. 774, September Term, 1902.

Trespass.

The fact that a juror, called to sit in a trial of a case in which his employer is a party, is a good ground of challenge, and should be sustained.

For plaintiff, John P. Kelly, Joseph O'Brien, I. H. Burns, M. J. Martin and R. W. Rymer, Esqs.

For defendant, James H. Torrey, W. J. Torrey, Everett Warren and Chas. P. O'Malley, Esqs.

Opinion by Chas. B. Staples, P. J., 43rd Judicial District, Specially Presiding.

The first error of the court, assigned by defendant, was in sustaining the challenges of the plaintiff to Thomas Thomas and Edwin Thomas, jurors, who were amongst the twenty drawn from the box for the trial of this cause.

The ground of each challenge was, that the juror was an employee of the defendant company, this fact being conceded, one being employed as a miner, about eight miles from where the alleged trespass was committed, and the other being in charge of certain operations of the company, north of said locality and entirely disassociated with it.

As a case of first impression we sustained these challenges upon the theory that neither of these men could go into the jury box free from such control or influence as would permit him to act in an unembarrassed and impartial manner in determining the issues presented to him. Since then we have made an examination of the authorities on the subject which seem to sustain our action. We are not concerned in ascertaining why twelve jurors were selected for the trial of causes, and we doubt if it ever has been satisfactorily explained, but we do find that the oldest authorities upon the selection of jurors for the trial of causes, are full and specific as to their qualifications and disqualifications.

Sir Edward Coke divides the challenges to jurors, individually, into four heads, and under the head of *propter affectum*, we find this

sub-division as good ground for principal challenge, viz.: "If he be of counsel, servant, or of robes, or fee of either party, it is a principal challenge." Co. Litt, 157 b.

In his comment upon this cause of challenge, Sir William Blackstone, 3 Comm., 363, said:

"Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a principal challenge, or to the favor a principal challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favor: as * * * that he is the party's master, servant, counselor, steward or attorney."

In *Pipher vs. Lodge*, 16 S. & R., 214, it was held that "A tenant who holds from year to year as a cropper, is disqualified to serve as a juror in a suit to which his landlord is a party," and Chief Justice Gibson in his opinion affirming the Court below, said: "A tenant who holds from year to year as a cropper is indisputably disqualified as a juror, in an action to which his landlord is a party; and tenure in such terms is a principal cause of challenge. Whether the landlord may dis-train or not (about which I intimate no opinion) the relation is intimate and one of dependence. He may by the mere exercise of his will determine the tenancy, and deprive the cropper of his contract, who, therefore, cannot stand indifferent; and the juror who was in this predicament was promptly set aside."

In *Harrisburg Bank v. Forster*, 8 Watts, 304, it was held that "it is a good cause of challenge to a juror that he is a tenant of one of the plaintiffs," and his remarks upon *propter affectum* as cause of challenge, Justice Kennedy, *inter alia*, said. "Sir William Blackstone does not profess to enumerate all the causes of challenge under this head; he only mentions some of them, by way of example and illustration; and they are very sufficient to show that the juror ought not to stand in any relation to the party, arising either from contract or otherwise, that could carry with it *prima facie* evident marks of suspicion of favor, such as *steward*, which is one of the relations mentioned."

In commenting upon this subject in *Cummings v. Gann*, 52 Pa., 484, Thompson, Justice, said: "All the authorities seem to be that where the objection is not on the ground of relationship, to require it

to be shown as a ground of principal challenge *propter affectum*, as between the party and juror, *that the former* holds a position in which he might exercise a control over the latter."

Applying these expressed disqualifications to the jurors challenged in this case, we feel that we committed no error in sustaining the challenges. The defendant company at the time of the trial was largely interested in the County of Lackawanna in mining and railroad operations, employing a large number of men, amongst whom were the two jurors; the case to be tried was an important one, involving the question of tort, and, if that was decided against the defendant company then the question of amount of damages. Under the criterion as laid down by Coke and Blackstone, they were disqualified, and applying the test as stated by Chief Justice Gibson, Kennedy, J., and Thompson J., they were disqualified.

The relation was "intimate and one of dependence" and the defendant company could by "the mere exercise of will" terminate it. It carried with it "*prima facie* evident marks of suspicion of favor," and as between the defendant company and the jurors, the former held "a position in which it might exercise a control over the latter."

We take it for granted the jurors, if they had been sworn, would have endeavored to have done their duty, but they would have been like the rest of us, and labored under the burden of the point of view of their master, which would have been hard to dispel.

We cannot be too careful in the preservation of the right of every one to a fair trial, by jury, of disputed rights and alleged wrongs, and in the preservation of this right it behooves us to watch with jealous care the selection of the jurors, so that they may be free from suspicion and control, either directly or indirectly.

Charging one's wife with adultery without reason or probable cause is held, in *Mathewson v. Mathewson* (Vt.) 69 Atl. 646, 18 L. R. A. (N. S.) 300, not to be intolerable severity, within the meaning of the statute permitting a divorce on the ground, although it causes her much mental suffering, where it does not cause her bodily harm or reasonable apprehension of it.

In the Court of Quarter Sessions of Lancaster County.

Commonwealth vs. Brubaker.

No. 3, April Sessions, 1908.

Motion to Quash Indictment.

Indictments—Two Bills on Same Complaint.

Where a grand jury has ignored a bill of indictment, the district attorney should not send in a second indictment to a succeeding grand jury on the same complaint, there being no pressing and adequate necessity for such action

Coyle & Keller, for motion.

John E. Malone, J. W. Brown, J. W. Johnson, district attorney,
and S. V. Hosterman, assistant district attorney, contra.

Opinion by Landis, P. J., Oct. 10, 1908.

In this case it appears that a return for assault and battery, committed by the defendant upon the person of one Jacob Morhardt, was made to November Sessions, 1907, and on Nov. 19, 1907, when a bill of indictment was presented to the grand jury, their finding was, "Not a true bill, and prosecutor, Jacob Morhardt, to pay the costs." The judge presiding at the sessions struck off the latter part of the finding, and endorsed upon the indictment, "It appearing to the court that the prosecution was instituted on advice of the district attorney, so much of the return as imposes the costs on the prosecutor is stricken off." Without a new complaint being made the district attorney, on April 20, 1908, sent a new bill to the grand jury called for the April Sessions, 1908, and that grand jury returned, "A true bill." This action on the district-attorney's part was approved by the court; but conceding, however, that leave was so obtained, the question that is now raised is whether, in a case of this character, a second bill on the original complaint should have been sent to the second succeeding or any other grand jury after the original bill had been ignored.

In *Com. v. Green*, 126 Pa. 531, Mr. Justice Clark said: "It is certainly true . . . that the district attorney, in an exigency or when the occasion seems to require, may prefer an indictment before a grand jury without a previous binding over or commitment, but this power is only to be exercised under the circumstances stated for the public good,

and then the proceeding is always under the supervision and control of the court. 'In practice,' says Judge King, 'however, the law officer of the commonwealth always exercises this power cautiously—generally under the direction of the court, and never unless convinced that the general public good demands it.' 'It is to be exercised in the ordinary case,' says Mr. Justice Woodward, in *Rowand v. Com.*, 82 Pa. 405, 'under the supervision of the proper court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the court could be brought here for purposes of review only when the abuse of their discretion should be found to have been both manifest and flagrant. Cases can be conceived where the ends of justice would be defeated by the delay and publicity of a motion in open court for leave to send up an indictment, and in such cases it would be the duty of the prosecuting officer to act promptly and upon his own responsibility. While, however, the possession of this exceptional power by prosecuting officers cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity, it is the duty of the quarter sessions to set the officer's act aside.' " In the case just referred to the grand jury made a presentment of a defendant for keeping a bawdy house. The learned judge, in making reference to the character of the prosecution, said: "It is plain that the exigency of this case did not require, or even appear to require, this extraordinary exercise of power on the part of the district attorney. There was no emergency, no demand of haste, no effort to escape, not even any appearance of an escape; there was no public good to be subserved; indeed, there was absolutely nothing to call for this unusual method of procedure, and it is not pretended there was. It is true that in this case the indictment was prepared and sent to the grand jury 'with leave of the court,' but the court, upon being informed that the presentment was not made upon the knowledge and observation of the grand jury, and was therefore no presentment at all, had a right to revoke that leave and to quash the bill, which was done." Therefore, while there can be no doubt that district attorney's bills without any preliminary information, or bills that have been once ignored, can be sent to the grand jury with leave of court, when the emergency of the situation demands such action (see *Rowand v. Com.*, 82 Pa. 405; *Com. v. Montross*, 8 Pa. Superior Ct. 237; *Com. v. Brown*,

23 Pa. Superior Ct. 470; *Com. v. Sharpless*, 31 Pa. Superior Ct. 96), the exercise of this extraordinary power is always subject to the supervisory control of the court, and, in the absence of some pressing and controlling necessity, it is improper for the district attorney to send an indictment before a grand jury without a preliminary hearing: *Com. v. Sheppard*, 20 Pa. Superior Ct. 417.

The only question, therefore, to be considered is whether or not the case before us was of such a character as to call for the exercise of this power on the district-attorney's part. It was one of simple assault and battery. It does not appear that any public good was to be subserved; that there was a demand of haste; that there was any effort to escape, or, in fact, that there was anything that called for this unusual method of procedure. There was no petition or allegation of oversight, mistake or fraud as to the action of the grand jury on the first bill. The consent of the court to the sending of the bill to the grand jury was doubtless right as the matter then stood and on the presentation then made before it; but, as was said by Mr. Justice Clark in *Com v. Green*, 126 Pa. 531, "The order quashing the bill was certainly right when the facts appeared. . . . The same court which, in the exercise of the same discretion, afterwards quashed the bill. We think that discretion was properly exercised."

We can add nothing further to what has been so well said in the case just quoted from. There was absolutely nothing that called upon the district attorney to proceed in this manner before the April grand jury. The usual method of procedure was open to the prosecutor, and he might have instituted a new prosecution if he felt aggrieved. As no public interests were affected, the district attorney should not have been called upon to act, nor should he have acted in the premises. See, also, *Com. v. Whitaker*, 25 Pa. C. C. Reps. 42.

For this reason, we think the indictment should be quashed.

Motion granted.

Delivery of a deed placed in escrow is held, in *Manning v. Foster*, 49 Wash. 541, 96 Pac. 233, 18 L. R. A. (N. S.) 337, to be enforceable although the escrow agreement was not in writing, on the ground that the statute of frauds does not apply to such an agreement.

In the Court of Common Pleas of Lancaster County, No. 49, May Term, 1908.

Leaman, et al., vs. Lancaster County Mutual Insurance Co.

Justices of the Peace—Service of Summons—Constables' Costs—Act of March 20, 1810.

Certiorari.

The proceedings of an alderman will be set aside on certiorari where it appears that the summons was not served by the constable of the township where the defendant company had its office, although the constable's costs endorsed on the writ were the same as the constable of the said township would have been entitled to.

A justice can amend a constable's return in accordance with the facts, but he should not on the return that it was amended by him.

Charles W. Eaby, for certiorari.

E. M. Gilbert, contra.

Opinion by Hassler, J., June 27, 1908.—The first and second exceptions to the justice's record are to the effect that the summons was not issued to the constable of the township where defendant resides, which in this case is where its office is located, nor to the next constable most convenient. That this is a fact is clearly shown by the depositions

The Act of March 20, 1810, section 48, 5 Sm. Laws, 161, provides that a justice must direct a summons "to the constable of the township, ward or district where the defendant usually resides or can be found, or to the next constable most convenient to the defendant." The defendant in this case is an insurance company having its office in Paradise township, Lancaster county. The constable to whom the summons was issued lives in the Third ward of Lancaster city. There is a constable residing in Paradise township, and a number very much more convenient to the defendant's office than the constable to whom the summons was directed. The defendant did not appear at the hearing. Under such circumstances it has been frequently decided that the justice does not acquire jurisdiction. The last case on this subject, in which others are cited, is one of this court—Yost v. Yost, 25 Lanc. Law Rev. 54. In that case, as well as in others, it is stated that the reason for the Act of Assembly is that the defendant might be put to large and unnecessary costs if the subpoena was given to a constable residing at a great distance from his residence, and this appears to have been understood

by counsel for the plaintiff as well as the justice to mean that if the costs are the same as they would be if the summons had been directed to the proper constable, the act does not apply. This is a mistaken view of the law, and under no circumstances can he direct a summons to any but to those designated. The constable's costs, as appears on the return, are the same as those which the constable of Paradise township would have been entitled to. This, however, does not include the constable. If we should confirm the justice's proceedings the constable could have all the fees he earned in serving the summons made part of the costs, and the same would have to be paid before the judgment could be satisfied. We mention this to show that even though the law is, as understood by the justice, there is nothing on the record or before the court to show that the defendant would not be subjected to greater costs by reason of the summons having been directed to a constable other than one of those designated in the Act of Assembly. In *Yost v. Yost*, 17 Dist. R. 633, we decided that the Act of 1810 is not repealed by the Act of July 9, 1901, P. L. 614.

We are of the opinion that the return of service complies with the Act of Assembly, and that the justice could amend the return of the constable in accordance with the facts at any time, if he did so, as is alleged by counsel for defendant. The proper way would have been for him to have noted on the return that it was amended, by changing it or adding to it, in accordance with the facts, but so long as the return has only been changed to agree with the facts, the defendant suffers no harm by the amendment, and it was within the powers of the justice to make it. The third and fourth exceptions are therefore without merit, and we dismiss them.

The first and second exceptions we sustain, and the proceedings of the justice are set aside.

The act of a mother in permitting her six-year-old child to cross, unattended, railroad tracks used for switching cars, is held, in *Vinnette v. Northern P. R. Co.* 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328, to be such negligence as will prevent a recovery by the parents for the child's death in case she is run over by a train before she is seen by, or her presence known to, any member of the crew.

In the Court of Common Pleas of Snyder County.

Fahs vs. York Bridge Company.

No. 54, February Term, 1908.

Rule to Set Aside Service of Summons.

Service of Process—"Place of Business"—Setting Aside Return on

Rule—Act of July 9, 1901.

The "place of business" of defendant, within the Act of July 9, 1901, P. L. 614, relating to service of process, means the permanent location at which the business of the firm or corporation is done, and not the temporary location of workmen engaged in some contract.

Where a sheriff's return of service of a writ of summons is full and explicit upon its face, it cannot be set aside upon a rule and evidence showing that service was not in fact made at defendant's place of business, but for such purpose a plea in abatement is necessary.

Charles P. Ulrich for rule.

A. W. Potter, contra.

Opinion by McClure, P. J., July 6, 1908.

Defendant's contention is that this court is without jurisdiction, as the cause arose in Columbia county, and the defendant has no office or place of business in Snyder county, nor do any of its officers or directors live or have a residence in said county. That the only business it is transacting in the county is the construction of a bridge at Selinsgrove, under contract with the York Construction Company, and it has no property in the county save the tools and materials in and about said bridge.

It has been decided in *Malaney v. Pennock*, 18 York Leg. Record, 45, that the taking of a contract for a single undertaking by a non-resident or corporation does not establish a "place of business" in the county within the meaning of the Act of July 9, 1901, P. L. 614. This is in entire accordance with the common understanding of the words, viz., a permanent location at which the business of the firm or corporation is done, not the temporary location of a gang of workmen engaged in fulfilling some contract. If the latter was a "place of business," then service might be made on a corporation wherever one of its Italian workmen could be found wielding a pick, for he would be at the "place of business" and a "person for the time being in charge thereof."

The defendant, however, has mistaken its remedy. When a sheriff's return is not full and explicit, an inquiry can be made into the actual facts and an irregular service of process set aside on a rule without putting the defendant to plea in abatement: *Park Brothers v. Oil City Boiler Works*, 204 Pa., 453.

But where a return is full and explicit on its face, it cannot be set aside on extraneous evidence, and is conclusive on the parties: *Ben Franklin Coal Co. v. Pennsylvania Water Co.*, 25 Pa. Superior Ct., 628; *Popowicz v. Worth Brothers Co.*, 14 Dist. R. 312. Here the return is full and complete upon its face and cannot be contradicted. To raise the jurisdictional question resort will have to be had to a plea in abatement: *Sheetz v. Chesapeake & Ohio Ry. Co.*, 10 Dist. R. 373.

July 6, 1908, rule discharged.

NOTE—As to setting aside return of service upon a rule to show cause, see *Bayard v. Mack*, 17 Dist. R. 165, and cases cited in note, and *Kester v. Howley*, 17 Dist. R. 398.

That a special assessment for construction of a sidewalk cannot be made a personal obligation of the owner of the abutting property, recoverable by action, is held, in *Brookings vs. Natwick* (S. D.) 117 N. W. 376, 18 L. R. A. (N. S.) 1259.

The common-law rule that replevin will not lie against one not in possession at the time of the commencement of the action is held, in *Andrews vs. Hoesle*, 47 Wash. 220, 91 Pac. 772, 18 L. R. A. (N. S.) 1265, not to apply where property has actually been in defendant's possession, and has been wrongfully transferred by him, without plaintiff's knowledge, before the commencement of the action.

A provision in a building contract for arbitration of any damage through default in promptly finishing the work is held, in *Hunn vs. Pennsylvania Institution for Blind*, 221 Pa. 403, 70 Atl. 812, 18 L. R. A. (N. S.) 1248, not to apply to defaults due to failure of the architect to furnish the plans and designate materials, and furnishing improper plans.

In the Court of Common Pleas of Northampton County

No. 17 November Term, 1908.

Divorce—Issue—Master—Practice.

SEIPLE VS. SEIPLE.

Libel for Divorce. Petition to Respondent to file answer nunc pro tunc and for issue.

When respondent in a libel for divorce makes default in answer within the time limited, he will be allowed to file it and demand an issue, nunc pro tunc, although a master has been appointed, if application be not unreasonably delayed, and no depositions have been taken, provided the libellant has not been materially prejudiced.

R. A. Stotz, for libellant.

Parke H. Davis, for respondent.

Opinion by Scott, P. J., Dec. 14, 1908.

The subpoena in this case was returnable to the second Monday of November (9). No appearance was entered, and no answer made. On the 11th, the master was appointed to take testimony and report. He designated two o'clock p. m. of November 19 for that purpose, of which the respondent, it is assumed, was personally notified by process of the master for five days, as required by the rules of court. He did not seek the advice of counsel prior to the 18th, by reason, as is now asserted, of his poverty and consequent inability to pay a retainer. An answer was interposed the following day, which was received by the prothonotary and filed. The master adjourned the hearing without taking any depositions. Although the answer was filed without leave of court, it was on the record, and correct practice demanded from libellant a motion that it be suppressed or stricken off. The same result is irregularly reached, however, by respondent's present petition of November 30 to have it allowed nunc pro tunc.

In these proceedings the state is always an unnamed third party, whose interest in her declared public policy against annulment of marriages, except upon full hearing if desired, is to be considered. *Akers vs. Akers*, 8 D. R. 419 (s. c., 22 Pa. C. C. 550). It is recognized in all the cases that if there has been no unreasonable delay, no depositions taken before the master, and the libellant not prejudiced, an answer will be received after the time limited by rule of court or

statute. Without it the respondent may appear and cross-examine witnesses, but cannot make substantive defence by testimony of his own. *Oxley vs. Oxley*, 191 Pa. 474. We have no rule of court upon the subject other than if an issue be demanded it shall be so stated in the answer and specify the facts which are disputed.

Whether an answer shall be permitted after the return-day, and conversely, whether it shall be disallowed, is a matter largely discretionary with the court in the absence of controlling rules (*Daugherty vs. Daugherty*, 28 Sup. Ct. 327); but it cannot be arbitrarily exercised when the application is promptly made and nobody will be injured. In a case less favorable to respondent than the facts here disclosed, the trial court was reversed for refusing the application to amend and award an issue. *Magill's Appeal*, 59 Pa. 430. What will constitute a waiver of the right by delay or proceeding before the master is discussed in *Allison vs. Allison*. 46 Pa. 321.

Sufficient has been said to show that the answer here, which is an unequivocal denial of the facts alleged in the libel, should not be stricken off. The excuse given for the default is not very strong, for it appears by the statement in counsel's brief that the respondent's means to make defence now are no greater than they were when the subpoena was served upon him, and no reason is given why he did not make the application to counsel then, which he delayed until notice of depositions. But the delay has been brief, and no testimony taken. The demand for an issue and trial by jury does not have the same support. It is no legal part of the answer of denial, although required by the rule of court, to be incorporated in it when filed. Section 58½ of these rules provides that "before a master will be appointed in any divorce proceeding the libelant shall deposit with the prothonotary the sum of \$100, who shall enter the record thereof and account for the same on the cost docket. The master shall be permitted to receipt for \$50 (upon filing his report). After the payment of all other legally taxable costs, including proceedings before the master, if any balance remains, the libelant may withdraw it".

This sum was deposited by the libelant, after respondent's failure to appear and answer, from her own funds. There was no order upon him for counsel fees and temporary alimony. A decree finally against him for costs could not be enforced. Trial before a jury now would

therefore be prejudicial to the libelant to the extent of the costs already incurred and paid by her into the prothonotary's office, less the master's fees, for which she would not be liable if the issue were decided in her favor. As his default created this condition, he is not entitled to have it changed until she is put in the same situation she occupied with respect to the controversy at the time the subpoena commanded him to appear and answer.

Now, Dec. 14, 1903, it is ordered that respondent's answer of November 19 be treated as filed nunc pro tunc as of November 7; that an issue be awarded; provided the respondent on or before January 1 next shall pay into the prothonotary's office, for the use of the libelant, the costs incurred and paid by her at the time of her deposit (less the master's fees), including the cost of service of notice for taking depositions, the amount of which, if paid, is hereby decreed as allowance to the libelant as part payment of counsel fees. Upon compliance with this order the cause will be put by the prothonotary at the head of the trial list for January 18 next. In default thereof the hearing shall proceed before the master upon five days' notice to the respondent.

From H. D. Maxwell, Esq., Easton, Pa.

An administratrix appointed by the courts of one state, who is by its laws given a right of action for the negligent killing of her intestate for the benefit of the next of kin, is held, in *Connor vs. New York, N. H. & H. R. Co.* 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252, to be entitled to maintain an action in the courts of another state where the defendant is found, and where a similar right of action is recognized which may be brought by a foreign executor or administrator, although the cause of action arose in the former state; and ancillary administration will not be allowed by the latter.

Acceptance is held, in *State ex rel. Ryan vs. Murphy* (Nev.) 97 Pac. 391, 18 L. R. A. (N. S.) 1210, not to be necessary to render effectual a resignation from a public office, where the statute provides that the office shall become vacant upon resignation of the incumbent.

In the Court of Common Pleas of Schuylkill County

No. 324 November Term, 1908.

Appeal from Justice of the Peace in action for recovery of sum expended in abating nuisance. Declaration under the Procedure act of 1887 and demurrer thereto.

SHENANDOAH BOROUGH VS. BENDER.

Boroughs—Suit under ordinance—Sufficiency of declaration—

Demurrer practice.

In a suit upon an ordinance a declaration averring the ordinance to be lost should at least set forth what the ordinance contains or the substance of it.

M. M. Burke, for plaintiff, cited *Bridgeman vs. Swing*. 205 Pa. 479, 480.

Jas. J. Bell, for defendant, cited *Com. vs. Chittenden*, 13 Pa. C. C. 362.

Opinion by Shay, P. J., April 5, 1909.

This is an action brought by the borough of Shenandoah to recover the costs of abating a nuisance under the provisions of an ordinance of said borough.

The demurrer raises the single question that the ordinance is not sufficiently set forth in the statement.

The statement alleges "the ordinance book of plaintiff containing the ordinance embracing said rules and regulations is lost and plaintiff is not able to attach a copy of said rules and regulations to this declaration as part thereof".

It is a well-settled principle that when a borough sues on an ordinance it must be set out in the pleadings. *Com. vs. Chittenden et al.*, 13 Pa. C. C. 362. Is it sufficient to merely allege its loss? We think not. The plaintiff should allege in his statement what the ordinance contained, if it is impossible to give an exact copy. He should allege at least the substance of it, such as he would be obliged to prove on the trial. This is the rule in reference to all lost instruments, and obtains as well to an ordinance as to a promissory note or any other paper which is required to be set forth in the pleadings. *Encyc. Pl. & Pr.*, Vol. 13, p. 364.

We deem it proper, however, to permit the plaintiff to file an amended statement in accord with the opinion above expressed, and so order.

Now, April 5, 1909, permission is given plaintiff to file an amended statement, and the demurrer is overruled at the costs of the plaintiff upon compliance with the above order.

Where a wife owning, as tenant in common with her brothers and sisters, an undivided share of lands subject to the dower and homestead right of their mother, together with such brothers and sisters, and upon a sufficient consideration, enters into an agreement with the mother not to partition said lands during the lifetime of the mother, such agreement is held, in *Glockel vs. Mathews* (Neb.) 117 N. W. 404, 18 L. R. A. (N.S.) 1208, to be binding upon her husband when claiming as tenant by the curtesy after the death of the wife and during the lifetime of the mother.

The damages to be awarded a minor for the negligent killing of his mother, under a statute authorizing such damages as, under the circumstances of the case, may be just, are held, in *Butte Electric R. Co. vs. Jones* (C. C. A.) 164 Fed. 308, 18 L. R. A. (N. S.) 1205, not to be confined to the period prior to his majority.

A municipal corporation is held, in *Boerth vs. Detroit City Gas Co.* 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, to have authority to fix by contract the rates which shall be paid by its inhabitants for gas furnished by a public-supply corporation, under statutory authority to consent for the laying of the gas mains in its streets under such reasonable regulations as it may prescribe.

An assignee of a bill of lading as collateral security for a draft upon the consignee of property represented by it, which he discounts, is held, in *Mason vs. Nelson* (N. C.) 62 S. E. 625, 18 L. R. A. (N.S.) 1221, not to be liable for breach of warranty by the consignor in the sale of the property.

In the Court of Common Pleas of Washington County

No. 106 August Term, 1907.

Rule to set aside judgment of a justice of the peace.

PERKINS VS. CHARLEROI PAVING & CONSTRUCTION CO.

Judgment—Certiorari—Appeal—Appearance—Waiver—Jurisdiction.

Where a transcript shows irregularities sufficient to justify a reversal of the judgment of the justice had a writ of certiorari been issued, but instead an appeal had been taken, and a general appearance entered for the appellant, said irregularities are waived, and the only defence that can be set up is one available on the trial.

Want of jurisdiction can be taken advantage of at any time; but that has reference to jurisdiction of the subject-matter and not of the person.

Messrs' Duncan, Chalfant & Warne, for plaintiff.

Mr. D. M. McCloskey, for defendant-appellant.

Opinion by McIlvaine, P. J., April 16, 1909.

On May 1, 1907, J. E. Perkins instituted a suit against the Charleroi Paving and Construction Company and W. B. Taylor before S. E. Wilson, a justice of the peace. The writ was returnable on May 7, 1907, between the hours of eight o'clock a. m. and nine o'clock a. m. On May 7 the plaintiff appeared and "claimed \$96.66 for lost time on contract and the loss of seventeen picks, five shovels, the use of scoop and use of other tools which were taken by the foreman of the Charleroi Paving and Construction Company and found in their possession". The transcript shows that J. E. Perkins was sworn for plaintiff, Harvey Osborne was sworn for plaintiff, W. H. Riggle was sworn for plaintiff and ——— Martusci was sworn for the plaintiff, and that the defendants did not appear but made default. Judgment by default was entered in favor of J. E. Perkins against the Charleroi Paving and Costruction Company for \$96.66, with costs of suit.

On May 15, 1907, the following recognizance and affidavit for appeal was filed: "Coram S. E. Wilson, J. P. Charleroi, Pa. Appeal from judgment rendered in the within case in favor of the plaintiff for \$96.66 and costs of suit. We become surety in the sum of Two Hundred Dollars. (Signed) Charleroi Paving & Construction Company (Seal) G. B. Nelson (Seal). Washington County, ss. And now, May 15, 1907, comes G. B. Nelan, president of the Charleroi Paving

& Construction Company, agent for said company and for W. B. Taylor in this behalf in this case, who being duly qualified according to law, deposes and says that the appeal entered in this case is not for delay but because he verily believes that injustice has been done. Deponent is familiar with the facts and makes this affidavit on account of the inability of the said W. B. Taylor through absence. (Signed) G. B. Nelan. Sworn to and subscribed before me this 14th of May, 1907. S. E. Wilson, Justice of the Peace".

A transcript with this recognizance and affidavit for appeal were day filed in this court on July 8, 1907.

On April 18, 1908, the defendants, who are also the appellants in this case, together with the bail, G. B. Nelan, presented a petition in this court setting forth, among other things, that on April 26, 1907, the said G. B. Nelan was arrested on a warrant issued by S. E. Wilson on the charge of having committed "the alleged crime of trover and conversion, J. E. Perkins" being the complainant. The said Nelan was not required to go to jail, and acting on the advice of his attorney did not appear at the hearing. That later the said Nelan requested a transcript of the proceedings in this case from the said S. E. Wilson and said S. E. Wilson furnished the said transcript, showing, however, the alleged issue and service of a summons and a judgment regularly entered against the above entitled defendants in a civil action in which J. E. Perkins is the plaintiff. Said transcript did not and does not show whether a summons in trespass or a summons in assumpsit was issued. To prevent the issue of an execution the said G. B. Nelan took an appeal from said judgment and entered the same in the court of common pleas of Washington county at the above number and term. Said J. E. Perkins, by his attorney, has threatened to issue a rule on the above-named defendant to enter a plea to the action based on said transcript. The petition further avers that no proper summons in assumpsit or summons in trespass was ever served upon any officer or member of said corporation or upon either the said W. B. Taylor or the said G. B. Nelan. The petitioners upon this petition ask that a rule issue on the said J. E. Perkins and the said S. E. Wilson, justice of the peace, to show cause, first, why the original records of said alleged criminal action and said alleged civil action should not be produced in this court at a future date;

second, why the said judgment alleged to have been entered by the said justice of the peace should not be opened up, and if it appear that no proper summons was originally issued and that the said justice of the peace did not have proper jurisdiction over the matter, or that the alleged service of said original writ was illegal and improper, that the said service be set asid and the saide action be dismissed at the costs of said J. E. Perkins.

The rule as prayed for was issued, whereupon the plaintiff, J. E. Perkins, filed his answer in which he sets forth, first, that this rule is "merely an effort in an irregular way to accomplish the purposes of a certiorari from the court of S. E. Wilson, the justice of the peace, in whose court the proceeding was originated and by whom it was tried and judgment rendered. After the rendition of judgment by said justice, the defendants, on May 15, 1907, regularly appealed therefrom to this court and filed their appeal at the number and term cited at the head of this answer. By having so made and perfected their appeal, they exercised the right of electing a remedy, and having taken their appeal and filed the same in this court they are not now entitled to be heard on the matters set up in said petition other than by trial of their appeal in the regular way". The answer in reply to the allegations of the petition further sets out that no warrant for the arrest of G. B. Nelan was issued in this proceeding, and if any such warrant of arrest as described in said petition was issued, it was in some proceeding or cause of action other than the one a transcript of which is entered as the foundation of this appeal. The answer further sets out that it is not true, as alleged in the third paragraph of said petition, that no proper summons was issued by the said justice, S. E. Wilson, and served. On the contrary, the summons in said cause was regularly issued and served and the cause duly prosecuted before the said justice and regularly proceeded to judgment, as appears by the transcript of the justice's docket filed by the defendant for the purpose of this appeal. The respondent therefore prays the court to dismiss said rule and the petition on which it is based at the costs of the petitioners, the defendants named in this case.

An inspection of the transcript filed in this case shows irregularities sufficient to justify a reversal of the judgment of the justice

had a writ of certiorari been issued, but an appeal having been taken by the defendants generally, and a general appearance having been entered for them in this court on that appeal, we are of the opinion that the irregularities which appear on the face of the transcript, which would have been sufficient to reverse the judgment on a certiorari, are waived by this appeal and general appearance, and that the only defence that the defendant can set up will be such a defence as is available to him on the trial of this appeal.

This ruling, we think, is fully justified by the decision of the Superior Court in the case of *Silley vs. Burt*, 21 Pa. Super. Ct. 618, and in *Weidenhamer vs. Bertle*, 103 Pa. 448. It is true, as argued by the petitioners' counsel in this case, that want of jurisdiction can be taken advantage of at any time, but that has reference to the want of jurisdiction of the subject-matter and not to jurisdiction of the person of the defendant, for it is universally held that a defendant can waive any irregularity of jurisdiction on account of the irregularity or want of a proper service of summons. In this case the irregularity appears to be in the service of the summons and not in the subject-matter of the litigation, for the transcript sets out that the claim of \$96 is for loss of time on contract and the loss of certain tools which the defendants had in their possession. For us to grant the relief now prayed for would be simply to turn the remedy of appeal which has been resorted to in this case into a certiorari. This we do not think we have any power to do, and that the rule which was granted in this case was improvidently granted.

In the cases cited by petitioners' counsel the facts were entirely different from the facts in this case. In one of the cases in which the court struck off the judgment because the transcript showed that the justice had no jurisdiction of the person of the defendant on account of improper service, the transcript had been filed in court by the party in whose favor the judgment was entered; he had issued an execution on the judgment before the justice of the peace, and that execution had been returned "no goods", and then he filed a transcript of the judgment with the prothonotary and had judgment entered thereon in his favor in order to obtain a lien against real estate, and the defendant moved the court and obtained a rule to show cause why the judgment should not be stricken from the record, and this

was done, and such a proceeding was clearly regular. But an entirely different state of facts exists in the case before us. Here the defendant himself brought the transcript into court, and for the purpose of appealing to this court, and in cases of that kind the act of assembly points out the course that shall be pursued, and that is that this court shall try the case de novo on the issue joined upon the appeal.

And now, April 16, 1909, this rule came on to be heard and was argued by counsel, whereupon, upon due consideration, the rule is discharged at the costs of the petitioners therefor.

From R. W. Parkinson, Jr., Esq., Washington, Pa.

One of the parties to a building contract which provides that all matters in dispute shall be submitted to an arbitrator is held, in *Fredrick vs. Margwarth*, 221 Pa. 418, 70 Atl. 797, 18 L. R. A. (N. S.) 1246, not to be entitled to revoke his authority when, through mistake, he has failed to consider and decide a part of the dispute submitted to him, and an action on the award has failed on that account; but he may proceed to rehear and decide the matter still in dispute.

A mortgage which, by state law, is required to be recorded to be valid against certain classes of persons, is held, in *Loeser vs. Savings Deposit Bank & T. Co.* 78 C.C.A. 597, 148 Fed. 975, 18 L.R.A. (N. S.) 1233, to be within the provision of the bankruptcy law making invalid as against the trustee unrecorded conveyances which are required to be recorded by the state law, although it might be valid for some purposes without being recorded.

An insurance company which received and appropriated money paid by a policy holder, knowing that it was intended as payment of a premium, is held, in *Matthews vs. Metropolitan L. Ins. Co.* 147 N. C. 339, 61 S. E. 192, 18 L. R. A. (N. S.) 1219, not to be entitled to avoid liability on the policy on the ground that he had not received a receipt in the form prescribed by the terms of the policy.

*In The Court of Common Pleas No. 3 of Philadelphia County
No. 2683 March Term, 1907.*

Rule for a New Trial.

KUNZ VS. BALZEREIT.

Bailment—Livery stable keeper—Negligence—Burden of proof.

The burden of proving negligence, with certain exceptions as to innkeepers and common carriers, is upon the bailor.

A livery stable keeper is not an insurer of horses boarded by him. He is bound only to ordinary care.

In an action against a livery stable keeper for the loss of a horse, the evidence being that the horse, boarded for a weekly stipend, was found lying upon the floor with his halter and chain on and his leg broken, but nothing to show how the accident happened, *Held*, binding instructions or the defendant were proper.

Mr. P. A. Wildemuth, for rule.

Fred. L. Breitingger, contra.

Opinion by Moschzisker, J., May 26, 1909.

The statement of claim avers that the defendant, the keeper of a livery stable, agreed for a weekly stipend to board and safely keep a mare belonging to the plaintiff; that the mare "through the neglect and carelessness of said defendant, his agents or employees, and although furnished with a proper halter and chain, became loose and had a leg broken, and was by reason thereof a total loss to the plaintiff". At trial the plaintiff proved his ownership of the mare and that he had put her to board at the stable of the defendant; that after a drive one Thursday evening he returned the mare to the stable and saw that she was put in her stall; that the next morning one of the men employed at the stable came to the plaintiff's house and he said "the horse had broken his leg". The plaintiff went to the stable and saw the defendant and his foreman. He asked, "How did it happen?" And the reply was, "I don't know". The plaintiff then asked, "Had he the halter and chain on?" To which a reply was made, "Yes; he had the halter and chain on, lying up there on the floor this morning". The court deemed this evidence insufficient to take the case to the jury, and instructed a verdict for the defendant, saying: "There is nothing in this case to show how the horse was hurt. A man keeping a livery stable is not an insurer of the safety of every horse that

comes into his stalls. All he has to do is to take ordinary care, such as an ordinarily careful man would take. If the plaintiff had called the hostler from the stable and proved that the defendant had failed to take the care of the horse that was required of him, you would have something to base a verdict on; but if you gave a verdict against the defendant on the testimony offered by the plaintiff you would be guessing at it. We do not know how the horse broke his leg. You must remember that a horse is an animate object that has the power to move around and to hurt itself, and we all have a general knowledge that horses often do injure themselves in their stalls. All we know is the horse was there and his leg was broken".

A motion is now before the court for a new trial. It is contended that the burden was not upon the plaintiff to show negligence, and that, upon showing the injury to the horse, the defendant, as bailee, was obliged to explain away the accident. The general rule in Pennsylvania is: With certain exceptions as to innkeepers and common carriers, the burden of proof of negligence is upon the bailor, and proof merely of the loss is not sufficient to put the bailee on his defence. The strict rule of the civil law, that the bailee must always acquit himself, has not been adopted in our state. When the bailee, at the time of the loss, gives an account of the cause and occasion of the injury sufficient to give the plaintiff a chance to investigate, although it may be only a general account, if it does not in itself show negligence on the part of the bailee, it devolves on the bailor to prove negligence: *Logan vs. Matthews*, 6 Pa. 417; *Farnham vs. Camden & Amboy R. R. Co.*, 55 Pa. 53. In *Pennsylvania R. R. Co. vs. Raiordon*, 119 Pa. 577, we have a case where a horse was shipped in a car under a contract specially relieving the carrier from loss except through negligence. The horse died in transit. There was no proof from the plaintiff of the cause of death. It was held that no presumption of negligence arose from the fact of loss and that the plaintiff was not entitled to recover. The principles ruling that case apply equally to the present one. The rulings of the trial judge in the case at bar are entirely in accord with the following cases cited in the briefs of counsel: *Schaeffer vs. Philadelphia & Reading R. R. Co.*, 168 Pa. 209; *Tower vs. Grocery Supply Co.*, 159 Pa. 106; *Buck vs. Pennsylvania R. R. Co.*, 150 Pa. 170; *Safe Deposit Co. vs. Pol-*

lock, 85 Pa. 391; Davenport vs. Pennsylvania R. R. Co., 10 Pa. Superior Ct. 47; Needy vs. Western Maryland R. R. Co., 22 Pa. Superior Ct. 489, and McNally vs. Jenkinson, 35 Pa. Superior 288.

The rule for a new trial is discharged.

A municipal corporation is held, in *Marth vs. Kingfisher* (Okla.) 98 Pac. 436, 18 L. R. A. (N. S.) 1238, not to be liable for failure to exercise a governmental power, as for failure to enact an ordinance against horse racing upon its streets, nor for failure to enforce such ordinance after it is enacted.

Duly deposited funds of a bankrupt's estate are held, in *Rockland Sav. Bank vs. Alden* (—Me.—) 68 Atl. 863, 14 L. R. A. (N.S.) 1220, to be in the possession of the court so as to prevent attachment even after distribution is ordered, and the checks have been drawn and countersigned, but not delivered, the custody of the law continuing until the trustee in bankruptcy actually pays the distributees the dividends awarded them.

An oral agreement by one suing to cancel a satisfied mortgage as a cloud on his title, to transfer to his attorney a portion of the property in case of success in the suit, is held, in *Stearns vs. Woltenberg* (—Or.—) 92 Pac. 1079, 14 L. R. A. (N. S.) 1095, to confer upon the attorney no right in the cause of action which the court can protect.

A provision in a contract by an attorney to conduct litigation for a contingent compensation, forbidding the client to settle the claim without his consent, is held, in *Re Snyder*, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, to be void as against public policy.

In the Orphans' Court of Philadelphia County

No. 404 April Term, 1889.

Exceptions to Adjudication.

DILLIN'S ESTATE

*Wills—Construction—Vests and Contingent Interest—Termination
of Trust.*

Where the interest of a distributee is vested, subject to be divested by a future event, for which protection is afforded by a trust, the trust cannot be superseded or annulled by the substitution of any other kind of security.

Testatrix devised her estate in trust to pay the income equally to her two daughters, A and B, for their respective lives and on the death of either her share of income to be paid to her children and issue *per stirpes* until the death of the surviving daughter, and on her death then to sell the real estate and pay one-half of the proceeds to the children of A and the issue *per stirpes* of any who might then be deceased, and one-half to the children of B and the issue *per stirpes* of any who might then be deceased. A died leaving children and issue of deceased children, who claimed that the trust should be terminated and distribution be made of the *corpus* of one-half of the fund. *Held*, it being uncertain whether the persons to whom the estate should go would be the children, grandchildren or more remote descendants, and protection being afforded to them by the trust, that distribution of the principal of the estate could not be made until the death of the survivor of the daughters of the testatrix.

The report of the first account is set forth in Dillin's Estate, 17 Dist. R. 918. This second account was filed for the purpose of enabling the children and descendants of Anna D. Rousseau, deceased, a daughter of the decedent, to ask that the trust be terminated, so far as their respective interests are concerned.

Testatrix devised her estate in trust to pay the income in equal shares to her two daughters, Anna D. Rousseau and Sarah M. Swayne, during their respective lives, "and upon the death of either of my said daughter, the income to which she would be entitled, if living, to be paid to her children and the issue of any of her deceased children, such issue to take only their parent's share, until the decease of the survivor of my said daughter, and upon the decease of such survivor of my said daughter, and then upon this further trust, to sell and dispose of all my said real estate either at public or private sale for cash, and upon the sale thereof, good and sufficient deed and deeds, to make, seal and deliver to the purchaser or purchasers thereof, without any liability on the part of any such purchaser

to see to or be liable for the application of the purchase money, and the proceeds arising therefrom, after the payment of expenses, to pay over and divide as follows; that is to say:

"One-half of said net proceeds unto the children of my daughter, Anna D. Rousseau, and the issue of any who may then be deceased, and such issue, if more than one, taking together only such part or share as his, her or their parent or parents would have taken if living, their heirs and assigns forever.

"And the remaining half of said net proceeds unto the children of my daughter, Sarah M. Swayne, and the issue of any who may then be deceased, such issue, if more than one, taking together only such part or share as his, her or their parents would have taken if living, their heirs and assigns forever".

The said Sarah M. Swayne is living. Anna D. Rousseau died on Sept. 29, 1888, and the exceptants claimed that the trust should be terminated and distribution made of the *corpus* of one-half of the fund.

The auditing judge (Lamorelle, J.) said in his adjudication:

"It is obvious that one trust only was intended and that but one was created; further, that it was the intention of the testatrix that there should be no division of the *corpus* until the death of the survivor of her two daughters, and that such division should be made among the then living grandchildren and the issue of those then deceased.

"This thought is expressed in language that is clear and unmistakable. The case cannot in principle be distinguished from Aubert's Appeal, 119 Pa. 48, and Wilen's Appeal, 105 Pa. 121, and is ruled by them. Carstensen's Estate, 196 Pa. 325, and Safe Deposit Co. vs. Wood, 201 Pa. 420, do not apply.

"The assent of Sarah M. Swayne that the *corpus* may now be divided is not in itself enough; the assent of all the remaindermen is necessary; and who will be the remaindermen cannot be determined until the time of her decease, at which time there is a possibility that there may be no living issue of either Anna D. Rousseau or Sarah M. Swayne, or of both; in fact, those then entitled may not be identical with those who could now assent or acquiesce.

"It is equally clear that upon the death of Anna D. Rousseau, her then living children and the issue of those deceased became entitled to the income which, had she lived, she would have continued to receive, and that, when and if thereafter any of the children died, their issue took; if they died childless, the income was to be divided among the remaining children and the issue of those deceased.

"Such is the scheme of the will. Testatrix realized that one of her daughters would, in the natural course of events, predecease the other, and that, if no disposition of that share of the income were made, it would fall into the residue of her estate and pass under the residuary clause; accordingly, to protect those who were to take the one-half of the *corpus* upon the termination of the trust, she gave them the income accruing in the interim. It was not a question of vesting at all; she simply designated by description the parties who were to take, and there is nothing in the will which even suggests that the income shall go in a channel different from the ultimate destination of the principal.

"It is difficult, however, if not impossible, to tell from the account, even as restated, how and to whom, and in what proportions, the income (except as to Sarah M. Swayne) has been paid out.

"It appears from the petition for distribution that Anna D. Rousseau left six children her surviving; two died without issue; two died leaving issue; in each case, one child, of whose estates guardians have been appointed; one is alive, Elizabeth R. Perry; and as to the remaining one, Alfred C. Rousseau, no information is given, save that he assigned his share.

"The auditing judge is of opinion, and so decides, that each child was entitled to the income during his or her life, and that upon his or her death his issue took; that, if childless, the share was to be divided among the remaining children and issue of those deceased; and that the share of Alfred C. Rousseau, which he assigned, was limited to what he would have received had he lived, and that, if dead, that which had been paid to his assignee after his death should have been distributed as hereinbefore set forth".

Henry Wiener, Jr.

E. Spencer Miller, for exceptants.

Opinion by Penrose, J., March 27, 1909.

Had the trust created by the will of the testatrix been intended only to secure to the survivor of her two daughters the full enjoyment of one-half of the income of the entire trust estate so long as she lived, the protection thus afforded might, under the principle of the familiar maxim, have been waived, and there would then have been no obstacle in the way of the present distribution of one-half of the *corpus* of the estate; but there was another, and no less important purpose:—She has, in terms, deferred the distribution of the principal of the estate until the death of the survivor of the daughters, and until then it is uncertain whether the persons to whom it will go will be the children, grandchildren, or more remote descendants of the first takers. Whether the estates are now contingent, in the strict technical sense of the term, or vested, subjected to be divested, is immaterial: in either case there are possible future interests, and the trust is required for their protection.

When the interest of a distributee, presently entitled to distribution, is vested subject to be divested by a future event, an act of assembly requires that before receiving the subject of the gift he shall give security to protect the right of the person or class to whom it is to go if the divesting event should happen; but where, as here, the protection is afforded by a trust the trust cannot be superseded or annulled by the substitution of any other kind of security: *Watson's Appeal*, 10 Crumr. 340; *Mooney's Estate*, 205 Pa. 418.

The will provides that at the death of one of the two *cestui que trusts*, her share of the income, as it may thereafter become due in the lifetime of the other, shall "be paid to her children and the issue of any of her deceased children". The persons who are then to receive it are clearly defined and determined. There is no restriction or limitation over, and the beneficial interests last until the termination of the trust, viz., until the death of the survivor of the original *cestui que trusts*. The beneficiaries are equitable tenants *pur autre vie*, and death in the lifetime of the *cestui que vie* does not of course, terminate their estates, which pass to their assignees, if they have made assignments, and to their personal representative if they have not: *Little's Appeal*, 31 P. F. Smith, 190. Of course, where, as in *Rowland's Estate*, 26 Crumr. 553, 151 Pa. 25, the income of the estate is given to a series of *cestui que trusts*,—children, grandchildren, &c.,

of the testator, and at their successive deaths, to the survivors and the issue of those who have died, until the death of the last survivor, a different principle may apply in order to avoid the confusion and inconvenience which would otherwise result. A "somewhat strained construction is permissible" where an absurdity, or inconsistency with the general intent as disclosed by the entire will, might otherwise result: but there is not such complication in the case before us; the words of the will are free from ambiguity, and the principle of Little's Appeal, 31 P. F. Smith, 190, governs.

The exceptions are sustained to the extent indicated by this opinion, and the adjudication modified accordingly.

NOTE.—On April 19, 1909, a decree was made, dismissing all exceptions other than Nos. 2 and 7, which were sustained. Exception No. 2 claimed that the income payable under the will to the deceased, children of Anna D. Rousseau, deceased, should have been awarded to the representatives of such deceased children. The 7th exception claimed that the income corresponding with the share given to John W. Rousseau accrued since his death should have been awarded to his administratrix. The adjudication, so modified by sustaining exceptions 2 and 7, was confirmed and distribution accordingly awarded.

Parol evidence of acts tending to show an estoppel upon an insurance company to take advantage of false answers in an application is held, in *People's F. Ins. Asso. vs. Goynes*, 79 Ark. 315, 96 S. W. 365, 16 L.R.A. (N.S.) 1180, to be admissible, notwithstanding provisions in the policy that no waiver shall be effective unless indorsed in writing on the policy at the home office of the insurer. With this case is an elaborate note collating the other authorities on the parol-evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel, as applied to insurance policies.

The duty on the part of pedestrians, drivers of vehicles, and others having occasion to use a public street crossing over which a street railway is operated, to look and listen for approaching cars, is held, in *Riedel vs. Wheeling Traction Co.* (W. Va.) 61 S. E. 821, 16 L.R.A. (N.S.) 1123, to be imposed by the general rule requiring them to exercise reasonable care and prudence in using the crossing.

In the Court of Quarter Sessions of Lancaster County

No. 30 November Sessions, 1908.

Petitions for Reward.

COMMONWEALTH vs. SANDOE.

Reward for Apprehension of Horse Thief—Act of March 15, 1812.

A person who furnishes information leading to the arrest of a horse thief, or who assists a constable in making the arrest, is not entitled to the reward of \$20 provided for in the Act of March 15, 1821, P. L. 90.

The person entitled to such reward must have actually pursued and apprehended the horse thief.

The burden is on the petitioner to show that he is entitled to the reward, and when the averments of his petition are denied in the answer of the county commissioners he must prove them by depositions or testimony.

J. W. Johnson and William M. Fletcher, for claimants.

N. Franklin Hall, county solicitor, contra.

Opinion by Landis, P. J., Jan. 2, 1909.

Cyrus Sandoe, the above-named defendant, stole a horse from Abram Mast. A complaint having been made against him by Mast, in the latter part of October, 1908, before Justice of the Peace E. E. Hunsecker, a warrant was issued to Harry E. Hess, constable of Salisbury township, for his arrest. Hess, having received information that Sandoe was in Franklin county, took the warrant there and arrested him at the house of a man by the name of Diller. When Sandoe was brought back to this county he entered a plea of guilty, and was sentenced to serve a term of five years in the Lancaster county prison. McElhare, one of the petitioners, then alleged that he conducted Hess to Diller's house and assisted in the arrest, and was therefore entitled to the reward stipulated for in the Act of March 15, 1821, P. L. 90. Gulden, the other petitioner, asserted that he first gave the information to Hess upon which the arrest was made, and for that reason that the reward should be awarded to him and not to McElhare. The county commissioners have filed answers to both applications, in which they state that Hess, under his warrant, pursued and apprehended Sandoe, and that, as he did this in pursuance of his duty as constable, the reward should be paid to neither of the claimants. All we have before us are petitions of the

parties, the answers of the commissioners, an *ex parte* affidavit of Harry E. Hess, and two letters written by Hess to parties residing in Franklin county.

In *Com. v Koffroth*, 21 *Lanc. Law Rev.* 397, we said: "It has been decided in a number of cases that the person who makes arrest, and not the person who furnishes the information which leads to it, is the one who is entitled to the reward." *Com. v. Fisher*, 5 *York Leg. Record*, 103; *Com. v. Anderson*, 5 *Kulp*, 202; *Walker's Case*, 23 *Pa. C. C. Reps.* 305; *McClain's Petition*, 4 *Pa. C. C. Reps.* 9. See, also, *Com. v. Taylor*, 17 *Dist. R.* 10; *Com. v. Turner*, 34 *Pa. C. C. Reps.* 358. And in *Com. v. Smith*, 23 *Lanc. Law Rev.* 92, we held that causing a horse thief to be apprehended was not sufficient to entitle one to the reward allowed by the Act of 1821; that the person claiming the reward "must pursue and apprehend," in order to sustain his claim. It is, therefore, clear, under the facts elucidated, that neither of the claimants should receive this reward.

Another conclusive reason has been presented to us to the claim of Harry McElhare. The commissioners, in their answer, "expressly deny that the said Harry McElhare did pursue and apprehend the said Cyrus Sandoe; . . . but the said commissioners aver that the said Cyrus Sandoe, horse thief, was arrested by Harry E. Hess, the regularly elected constable of Salisbury township, Lancaster county, Pa., upon a warrant issued to him by Ellis E. Hunsecker, a justice of the peace in and for the county of Lancaster aforesaid, upon the complaint made before the said justice of the peace by Abram Mast, a private prosecutor." In *Com. v. Smith*, 23 *Lanc. Law Rev.* 92, this court also held that "the burden of showing that he is entitled to the reward is on the petitioner," and "it is necessary for him to show that the averments of his petition . . . are true, either by depositions or testimony, as they are denied in the answer of the county commissioners." The same difficulty here confronts the claimant. He has offered no proper proof, and the averments of his petition are denied.

Both petitions for this reward are, therefore, disallowed and dismissed.

Petitions disallowed.

From George Ross Eshleman, Lancaster, Pa.

In the Court of Common Pleas of Green County

No. 86 December Term, 1908.

*Rule to Show Cause Why Subpoena in Divorce Should Not be
Quashed, it not Having Been Signed by the Judge
who Allowed it.*

WHITE VS. WHITE.

Divorce—Subpoena—Signing by Judge or Prothonotary.

Act of March 13, 1815.

The direction in the Act of March 13, 1815, § 2, 6 Sm. Laws, 286, that the subpoena in divorce shall be signed by judge, is superseded by the Act of April 14, 1834, § 77, P. L. 333, authorizing the prothonotary to sign and affix the seal to all writs and process; a subpoena in divorce, therefore, issued and signed by the prothonotary, which was allowed by the judge, though not signed by him, will not be quashed.

D. R. P. Huss, for plaintiff.

R. F. Downey, for defendant.

Opinion by Inghram, P. J., May 2, 1909.

We are of opinion that this case is ruled by the case of McQuaidei reported in 8 Montg. Co. Law Repr. 150; where it is said: "The Act of April 14, 1834 § 77, P. L. 333, provides that the prothonotary shall have power to sign and affix the seal of the respective courts to all writs and process.

"This would seem to supersede the requirements of the Act of March 13, 1815, § 2, 6 Sm. Laws, 286, wherein it provides 'that the subpoena shall be signed by the judge.'"

"The libellant must, as heretofore, secure the premission of the court before a subpoena can issue, but when the writ is awarded why should not the prothonotary, under the Act of 1834, issue the process just as in the other cases where the writs are of right?"

"At the time this divorce proceeding was instituted it was not the practice for the court to sign the subpoena. The libels were presented and the judge under his hand directed a subpoena to issue. This method of procedure is pointed out by our standard text-books on practice, and we are informed is followed in many of the judicial districts of the state."

Rule discharged.

From James J. Purman, Waynesburg, Pa.

In the Court of Common Pleas of Lackawanna County.

No. 1030 March Term, 1909.

Demurrer to Plaintiff's Statement.

THE JEFFERSON ASSOCIATION, ETC.

VS. FRANK M. MOYER.

Where membership in a corporation is set forth as an extra inducement for the sale of goods manufactured or sold by it the same does not effect the sale in question as that must be determined on its merit separate from the membership proposition.

The real action is for the price of goods sold and delivered. If that is shown to have been genuine and correct the legal aspects of the case stand solely on such premises.

Mr. C. A. Battenberg, for plaintiff.

Mr. W. L. Hill, for defendant.

Opinion by Newcomb, A. L. J., June 28, 1909.

This case came here on appeal from the judgment of an alderman. To this defendant demurs because of what is by the learned counsel conceived to be a variance of the cause of action as between the transcript and the statement. At first blush it might so appear. But on further examination the supposed variance turns out to be only apparent and not real.

The transcript shows the claim to have been "for goods sold and delivered to defendant at his instance and request." This may have been open to the objection that it was very much at large and by no means certain or definite. That, however, was waived by taking an appeal.

The statement founds the claim on a special contract of the parties in writing whereby defendant accepted an offer of membership in the plaintiff association at the cost of \$60.00, the amount in suit. On its part the plaintiff, in consideration of that sum, agreed to deliver to defendant a certificate of such membership together with a certain set of books of its publication, the sale of which was to be limited to its members, whereupon the agreed price was to be payable. With this is coupled an averment of delivery in due form.

It is quite evident that as gathered from the writing the real subject matter of the transaction was the sale of the books. So far as it imports a sale of membership in the publishing company it is to

be regarded as a mere empty device to attract trade. It is one of the various expedients to which resort is had in promoting the sale of books, more especially those for which there is no sale on their merits. As such the device may rise to the dignity of a joke, and is not to be taken seriously.

In substance, therefore, the action is for the price of goods sold and delivered as show in the transcript. In its statement the plaintiff declares on the contract for the sale of goodn, avering performance on its part. This involves no substantial variance, and the demurrer is not well taken.

Formal issue was joined so that the papers are in shape for final judgment at this time. We are disposed, however, to give defendant opportunity to take defense on the merits, if any he has. The demurrer is overruled with leave to defendant to file his affidavit of defense within ten days from this date; in default of which judgment will be entered for plaintiff for the amount of its claim as set forth in the statement.

A judgment discharging a subscriber to the stock of a corporation as garnishee for its debt upon failure of the plaintiff to contest his answer denying indebtedness is held in *Roma vs. Montgomery Iron Work (Ala.)* 47 So. 136, 19 L.R.A. (N.S.) 604, to be *res judicate* of the question of indebtedness in a subsequent direct proceeding by the creditor against him to apply his individual stock subscription to the payment of the corporate indebtedness.

A conditional vendee of personalty, who, in the contract, agrees that, upon failure to make the requisite payments, the vendor may take possession of the property and remove the same, is held in *W. T. Walker Furniture Co. vs. Dyson*, 32 App. D. C. 90, 19 L.R.A. (N.S.) 606, to have no right to recover against the vendor in trespass for using only the necessary force in retaking the property, requisite to overcome resistance wrongfully interposed by him.

Giving his own check in exchange for that of a third person is held, in *Matlock vs. Scheuerman (Or.)* 93 Pac. 823, 17 L.R.A. (N.S.) 747, to constitute one a holder of it for value.

In the Court of Quarter Sessions of Lackawanna County.

No. 804 October Sessions, 1908.

Exceptions to Report of Viewers.

IN RE: PUBLIC ROAD IN N. ABINGTON TOWNSHIP.

When it appears that viewers acting under the authority conferred upon them by the appointing power did not subscribe severally to the prescribed oath such an omission must be considered fatal unless the right to have it so considered has been lost or waived by failure to except on that grounds. It's the public interest that requires that their functions be performed under the sanction of an oath administered by competent authority. One viewer may administer the oath to another but he cannot swear himself.

Mr. Fred C. Hanyen, for exceptions.

Opinion by Newcomb, A. L. J., June 28, 1909.

On the merits this case is apparently with the petitioners. But for technical, though fundamental, reasons the report cannot be sustained.

The official qualifications of the viewers was not attacked by specific exception. But on taking depositions it developed that one of the viewers was not sworn according to law. This is fatal unless the right to have it considered has been lost or waived by failure to except on that ground: Beaver Township Road, 4 Pa. D. R., 562; East Penn Township Road, 2 Pa. C. C. R., 453. On its face the report is regular and purports to show that the viewers were duly sworn. In road cases, as a general rule, nothing will be considered except such matters as are brought up by specific exceptions, save only jurisdictional questions. But it is hardly to be said that the exceptants here are chargeable with waiver. The report says the viewers were properly sworn. The exceptants would have no reason to assume the fact in that particular to be other than as appeared in the report. So far as their private interests alone are concerned it is not apparent how they would be affected by the doctrine of waiver unless it should appear that they had notice to the contrary from some other source. And it does not so appear in this instance. The door to that information was first opened by the petitioners in putting in their counter depositions. One of the viewers being called on their behalf was asked if the viewers were sworn. It was irrelevant to any question involved in the exceptions or to any testimony taken to support

them. The answer was in the affirmative. On cross examination, however, it was disclosed that the witness first administered the oath to the other two viewers and then to himself. Under the authorities above cited this vitiates the report. It goes deeper than the mere private interest of the exceptants, and, even if so disposed, they cannot value it. Road viewers are jurors. It is the public interest that requires that their functions be performed under the sanction of an oath administered by competent authority. One viewer may administer the oath to another, because the statute so provides. But he cannot swear himself. That is not allowed by law. In a case where the viewers were not sworn until after they had proceeded with the view it was contended that it was not open to exception by parties and their counsel who were present on the ground and made no objection at the time. The contention was not upheld. "The viewers," said Judge Rice, "were to perform public duties, and this exceptant had no more right to waive their taking the oath than has a private individual, who possibly may be a suitor in the court, to consent that the judges be not sworn before entering on their duties": Foster Township Road, 1 Kulp, 249.

We will allow an exception directed to the point discussed, to be filed *nunc pro tunc* as of the date of January 28, 1909, and thereupon it is sustained and the report set aside.

A consent decree in an action under the statute by a citizen to enjoin the maintenance of a liquor nuisance, which permits acts contrary to the statute and prejudicial to the community, of which he fails or refuses to seek correction by appeal, is held, in Hemmer vs. Bonson (Iowa) 117 N. W. 257, 19 L.R.A. (N.S.) 610, to be reviewable under a writ of certiorari at the suit of any citizen, upon a proper showing of his qualifications.

A married woman, the owner of statutory separate real estate upon which is located a swimming pool and bath house conducted by herself and husband as a public resort, who is sued jointly with her husband, is held, in Graham vs. Tucker (Fla.) 47 So. 564, 19 L.A.R. (N.S.) 531, not to be liable for damages in tort to a party injured while lawfully using the premises, by his feet slipping and falling upon the projecting points of planks alleged to have been negligently left uneven.

In the Court of Common Pleas of Lackawanna County.

No. 1 May Term, 1907.

In Equity.

Petition for Leave to File Supplement Bill.

JOHN W. PELLIO VS. BULL'S HEAD COAL CO. ET. AL.

In a suit in equity where a stockholder in a corporation seeks an accounting at the hands of those charged with the administration of its affairs it must be shown that there was some mismanagement or other action calculated to prejudice the rights of the plaintiff.

When an issue has been framed and a decree of court entered in a phase of the case that is calculated to afford the relief required any amendment to the original bill is not desirable if the aid asked for has been already afforded.

Mr. S. B. Price, for plaintiff.

Messrs. I. H. Burns and C. Comegys, for defendants.

Opinion by Edwards, P. J., June 28, 1909.

In order to fully understand the nature and merit of plaintiff's petition we shall give a brief statement of the facts as disclosed by the record.

First. In 1907 the plaintiff filed his bill in which he alleged that he was a stockholder in the Bull's Head Coal Company, and that he was induced to sell his five shares of stock in the company to the defendants, one or both, through the fraud and misrepresentations of Whiteford acting for himself or the company. In the bill the plaintiff prayed for a re-transfer of the stock to him on his paying the amount he received for it, and he also prayed for "a full and true discovery of the accounts as to all business transactions of said corporation."

Second. After hearing, a final decree was entered directing the Bull's Head Coal Company to transfer the said five shares of stock to plaintiff on payment by him of a certain sum of money to the company. A decree was refused against Whiteford. An appeal was taken by the defendant company and a cross-appeal by the plaintiff. The supreme court dismissed plaintiff's appeal and affirmed the decree of the court below.

Third. The final decree of the court has been fully executed. The five shares of stock have been issued to plaintiff. He is now a stockholder, and occupies the same position in relation to the company that he did before he sold his stock.

Fourth. The only question decided by us at the hearing and by our decree related to the transfer of the stock from the company to the plaintiff. We refuse a decree against Whiteford because he took no title to the stock individually when it was sold by plaintiff. Whiteford acted for the company, and the stock was paid for with the company's money. Therefore it would be impossible to make a decree against him.

Fifth. Whiteford was secretary and treasurer of the company and Charles A. Burr was president. Those two men owned nearly all the capital stock of the company. They managed the company until the death of Burr in 1904, when the management fell into the hand of Whiteford aided in an informal way by the widow and executrix of Burr, who also became the owner of the Burr stock.

The foregoing statement of facts is preliminary to the consideration of plaintiff's motion.

The plaintiff prays for leave to file a supplemental bill after final decree. The general rule is that such a bill may be filed whenever necessary to aid in carrying into effect a former decree. This was decided in a case in our court: *Winton's Appeal*, 97 Pa., 385. In the case at bar the decree has been fully executed. The plaintiff has secured the specific relief he sought. He has had his stock, and he is now a stockholder of the Bull's Head Coal Company. In the original bill the plaintiff appeared before us as an individual seeking redress; in the supplemental bill he seeks an accounting as a stockholder. It is true that at the hearing we received evidence as to misappropriation of the funds of the company by the officers thereof. This evidence was relevant on the basis that the plaintiff was entitled to the value of his stock in case he failed to secure the specific relief prayed for by him, viz., the reassignment to him of his stock. On this phase of the case we quote from our opinion disposing of the exceptions to our findings of fact and law:

"Plaintiff claims also that we should make a finding from the evidence as to the value of the five shares of stock so as to determine the damages to which the plaintiff would be entitled in money. This claim is based on the general principle that when a court of equity has obtained jurisdiction for one purpose, it may retain it for general relief; and that it is desirable to avoid multiplic-

ity of suits. The principle relied on would apply with greater force if the defendant coal company had put it out of the power of the court to grant the specific and particular relief prayed for by the plaintiff. Let us examine the prayer of the plaintiff's bill.

"1. That the assignment of plaintiff's stock be cancelled.

"This prayer in effect is granted.

"2. That defendants be ordered to make full discovery of the matters stated in the bill and make a true account of the business transactions of the company.

"The purpose of this prayer is fulfilled in the evidence. There is a full disclosure of the accounts of the company.

"3. That the defendants be decreed trustees of the stock for plaintiff.

"This relief in substance is allowed.

"4. That the defendants, one or both, be ordered to reassign and redeliver the shares of stock to the plaintiff on payment by him of one thousand dollars and interest.

"This is the specific relief to which the plaintiff is entitled.

"5. That an injunction issue.

"6. General relief.

"It is clear that the plaintiff ought to be reinstated in his right as stockholder of the defendant coal company. The only way this can be done is by the company issuing to him his five shares of stock on payment by him of the money received for them. This is the particular thing that he requests shall be done, and the company is in a position to comply with the request. We have the right to believe that the plaintiff wants his stock and nothing else. He does not ask for the value of the stock. It is true he asks for general relief; but general relief is allowed when the specific thing plaintiff asks for cannot be done for some reason or another. The plaintiff, in the first instance, is entitled to his stock. Failing to secure the stock, he is then entitled to the value of it.

"Having in view the extensive power of a court in equity we have concluded to hold the present case within our grasp until the plaintiff receives either his stock or the value thereof in money."

When we disposed of the exceptions we issued an interlocutory order only, directing the transfer of the stock to the plaintiff within

thirty days. Our intention was to retain our grasp of the case until the plaintiff obtained the redress he was entitled to, whether it was the transfer of the stock according to the terms of the order, or an award of damages for the value of the stock if the company failed to make the transfer as directed.

It appears that no particular attention was paid to the interlocutory order. The thirty days expired and no step was taken by the plaintiff to secure the alternative relief he was entitled to on the failure of the company to transfer the stock; but on September 22nd, or thirty-three days after the date of said order, plaintiff submitted to us a final decree, which we signed. As we understood the situation at the time both parties were anxious to have certain questions reviewed by the appellate court.

It may be that the exact question before us now is only a question of practice. The practice is simplified in Pennsylvania by Equity Rule No. 53. "Whenever the circumstances are such as to require a bill of revivor, supplemental bill, or bill in the nature of either or both, or where additional or different parties are required to be joined, the same shall be made by way of *amendment* or addition to the original bill. * * * Where a new party is joined a copy of the original bill and the amendment shall be served as is provided for in the case of original bills." It will be observed that according to this rule the introduction of new matter, or new parties, into an equity suit must be by way of amendment. This answers the same purpose as a revivor or a supplemental bill and simplifies the pleadings. Many events may happen after the filing of an original bill which make amendments necessary. There may be a change of interest in the parties by conveyance or otherwise, or some of the parties may die and new parties must be substituted, or a vendor may sell pending a bill for specific performance as was the case in *Head vs. Meloney*, 111 Pa., 99, and many other contingencies may happen. Whatever they are, the various situations are taken care of in Pennsylvania equity practice by amendments.

In the present case it appears clear to us that the plaintiff is entitled to file a supplemental bill for one purpose only, viz., to aid in carrying out the final decree of the court. But, he does not need this aid, because his petition alleges that the decree has been complied with in every particular. Nor can the plaintiff, after final decree, revive the original bill by amendment, either to bring in a new party or for any other purpose.

Now, June 28, 1909, the petition of plaintiff for leave to file a supplemental bill in this case is denied.

In the Court of Quarter Sessions of Lancaster County

No. 48 January Session, 1908.

Rule to Discharge Surety on Bond.

COMMONWEALTH VS. DUKE.

Desertion—Surety—Discharge.

The surety on the recognizance of a defendant convicted of desertion conditioned that the defendant will pay a weekly sum for the support of his wife, will not be discharged from liability without payment on the arrest of the principal on attachment.

Joseph T. Evans, for rule.

H. M. Houser, contra.

Opinion by Landis, P. J., January 2, 1909.

The above named defendant was charged by his wife with desertion, and, upon a hearing before the court, was on January 25, 1908, ordered to pay the cost of prosecution, pay \$2 per week for her support, and enter into a recognizance in the sum of \$300 for the performance of the order. He paid the cost and gave a bond, with John M. Rettew as surety. Having failed to keep up his weekly payments, his wife, on October 24, 1908, presented a petition, asking that an attachment issue against him, and on October 31, 1909, he was arrested and is now in the Lancaster county jail. That being the situation, the security, although he has paid no money on account of the recognizance, asks to be relieved from his obligations.

In *Com. vs. Jones*, 90 Pa. 431, it was held that "the modification of order in desertion cases whether the proceedings are under the general law or the Act of February 27, 1867, P. L. 271, are in the discretion of the court, and the allowance may be increased or diminished from time to time to suit the changed circumstances of the parties, or for sufficient reasons may be revoked altogether, and such action is not reviewable here;" and therefore the action of the lower court in permitting the surety of one who had been ordered to pay a certain amount per week for the support of his wife and child to surrender the body of the defendant and be released from his recognizance was affirmed on appeal. To the same effect is *City of Philadelphia vs. Ownes*, 12 W. N. C. 292. These cases are not, however,

conclusive of the present controversy. While the trial court has the power to take such action, it is not bound to do so upon the surrender of the principal. Thus, in *Miller vs. Com.*, 127 Pa. 122, judgment was entered upon such a bond for want of a sufficient affidavit of defence. It there appeared that the surety had offered to return the body of the principal, but the Supreme Court, affirming the court below, in a *per curiam* opinion, held that "the surety on the recognizance of a defendant convicted of desertion, conditioned that the defendant will pay a weekly sum for the support of his wife, cannot be absolved from liability by and offer to surrender the body of the principal;" that "the obligation of the recognizance is voluntary, and can be discharged only by payment, according to its terms." In *Com' vs. Sherman*, 15 Lanc. Law Rev. 43, this court took the same view. In *Com. vs. Klingenberg*, 10 Del. Co. Reps. 163, it was held that "a surety for a man who has been ordered by the court to pay a weekly sum for the support of his child will not be relieved from his recognizance where it appears that he has not been required to pay anything notwithstanding the defendant has been surrendered."

As, therefore, we see no good grounds for the revocation of the original order, we are of the opinion that this rule should be discharged.

Rule discharged.

From George Ross Eshleman, Lancaster, Pa.

An agreement between two factions of the shareholders of a railroad company incorporated by the secretary of state, to the effect that one of such factions owning half of the corporate stock shall have the right indefinitely to name a majority of the directors of the company, and thus manage and control its affairs, is held, in *Morel vs. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L.R.A. (N.S.) 1136, to be against public policy, and void.

To keep open, manage, and superintend a theater and sell tickets therein on Sunday is held, in *Topka vs. Crawford* (Kan.) 96 Pac. 862, 17 L.R.A. (N.S.) 1156, to be labor within the meaning of an ordinance making Sunday labor a misdemeanor.

In the Court of Common Pleas of Centre County

No. 338 December Term, 1908.

Certiorari.

COMMONWEALTH VS. SNYDER.

Game and Fish Laws—Justice of the Peace—Certiorari—Record.

A summary conviction under the fish law of May 29, 1901, cannot be sustained when the record of the justice fails to show the county in which alleged offence is committed, and there is nothing in the record which would prove the defendant from prosecution in any other tribunal for the same offence.

W. G. Runkle, District Attorney, and John G. Love, for commonwealth.

W. D. Zerby, John J. Bower and S. D. Gettig, for plaintiff in error.

Opinion by Orvis, P. J., March 16, 1909.

The plaintiff in error, along with three other citizens, were arrested on the oath of H. H. Montgomery, constable, and brought before the justice of the peace, each charged with a separate offence, that of illegal fishing, in all the records, with possibly one exception, the time fixed as on the same day, namely, November 9, 1908. The informant admitted at the trial before the justice that he knew nothing of the fact upon which he made information. The record shows that each of the defendants was present at the trial, that G. D. Shannon, fish warden, was the only witness against them. In this particular case the fish warden testified that Snyder did illegally use a fish basket, "two rows nailed fast to framework of basket in the water of the commonwealth." This is all the evidence as it appears from the record. The record shows that the defendant was sworn but his evidence is not set forth upon the record. The justice finds him guilty of violating § 2 of the act approved May 29, 1901, and other sections, and to a day adjourned imposed a fine of \$25 and cost, and in default directed that the plaintiff in error should be committed to the county jail for a period of twenty-five days. There is nothing in the evidence to in any way individuate the alleged offense; the stream is not mentioned, the locality is not described; neither in the evidence nor in the finding of the justice thereon is there any-

thing to show that the alleged offense was committed within the county of Centre, whether it is the identical offense upon which three other individuals, namely, Ammon Snyder, Henry Fryer and H. S. Snyder, were tried and convicted, nor is it possible for us to determine the merits of the case, as the evidence of the part on the defence is not given on the record. The record totally fails to protect Snyder in case he should be arrested before any other tribunal for same offense. While the justice may have had evidence before him sufficient to justify his action, he has failed to spread it upon the record. He has utterly failed to show jurisdiction within himself and we must sustain the exceptions.

And now, to wit, March 16, 1909, exceptions sustained and the sentence or judgment of J. H. Keichline, justice of the peace, entered upon his record on November 28, 1908, is hereby set aside.

From S. D. Gettig, Esq., Bellefonte, Pr.

The law is held, in *Conrad vs. Baltimore & O. R. Co.* (W. Va.) 61 S. E. 44, 16 L.R.A.(N.S.) 1129, to impose no liability in favor of children, upon a railroad company for maintaining upon its private property an unlocked, unfastened, and unguarded turntable, though located in a thickly-settled community, near a public street, on ground on which children are wont to congregate for play.

A passenger desiring to leave the train at flag station where the train stops only on notice is held, in *Rock Island, A. & L. R. Co. vs. Stevens*, 84 Ark. 436, 105 S. W. 1032, 16 L.R.A.(N.S.) 1132, to be bound to notify some employee of the train of such desire; and, in case the train is crowded so that it becomes evident that the employee will not reach him in the regular discharge of his duties before the station is reached, he must seek him.

As between the grantor and the trustee, a deed granting, bargaining, and selling land to a trustee for the use of a third persons is held, in *Blake vs. O'Neal* (W. Va.) 61 S. E. 410, 16 L.R.A.(N.S.) 1147, to vest the legal title in the trustee under the statute of grant, independently of the statute of uses

In the Court of Common Pleas of Lackawanna County.

No. 17 May Term, 1908.

In Equity.

Rule to Vacate Decree, Amend Bill, &c.

**EMMA S. GRAVES VS. JOHN J. DURKIN,
COMMISSIONERS, et. al.**

An amendment will be refused when it asks for a mere statement of conclusions of facts and law.

Mr. Frank E. Donnelly, for plaintiff.

Mr. John J. Toohey, County Solicitor, for defendants.

Opinion by Newcomb, A. L. J., February 17, 1909.

This rule is made absolute as far as to allow the bill to be amended in the following particulars, viz;

First, by substituting Robert W. Allen as one of the county commissioners defendant in place of Morgan Thomas.

Second, by adding the following paragraph to the averments of the bill, to wit: "11½. The land in question was assessed for the years 1901 and 1902 as aforesaid, as seated land, but said land was at the time of said assessments and still is abandoned land, and for ten years last past and upwards has neither been accepted by, nor in actual possession of any owners nor of the parties to this bill. The said land has a value of \$10,000."

The other amendment asked for is a mere statement of conclusions of fact and law. So far as the points therein attempted to be made are material to plaintiff's case they are already within the averments of the bill. The amendment in this particular is refused. To that extent as well as with respect to the motion to vacate the decree heretofore made dismissing the bill and to reinstate the demurrer, the rule is discharged.

The owner of a wharf which has collapsed while being put to the use for which it was intended is held, in *Chistadoro vs. Von Behren*, 119 La. 1025, 44 So. 852, 17 L.R.A. (N.S.) 1161, to be responsible for damages to those who were legitimately on it at the time and were injured.

In the Court of Common Pleas of Centre County

No. 15 December Term, 1907.

Appeal from the Justice of the Peace upon summary conviction of the defendant for violation of the fish laws and motion to quash the appeal.

COMMONWEALTH VS. HORNER.

*Game and Fish Laws—Constitutional Law—Act of May 29, 1907,
P. L., 311.*

Section 7 of the fish law of May 29, 1907, P. L. 311, violates Art. v. Sec. 14, of the Constitution relating to appeals in case of summary conviction.

W. G. Runkle, District Attorney, and John G. Love, for motion.

W. D. Zerby, John J. Bower and S. D. Gettig, for defendant.

Opinion by Orvis, P. J., March 16, 1909.

The defendant and appellant were arrested under the act of May 29, 1907, P. L. 311. Being convicted before the justice of the peace the record was brought into this court the provisions of § 7 of said act, by the appellant entering into his recognizance but without obtaining leave of the appellate court or of any judge thereof. The motion to quash is based upon two grounds:

First. That § 7 violates Art. v, Sec. 14, of the Constitution, and

Second. That the act of 1907 does not apply to the offense alleged to have been committed by the defendant and appellant.

Just why the commonwealth alleges the second reason we can scarcely understand; for if it is a substantial one, the commonwealth was in the wrong to institute proceedings against the defendant under this act. As there is no evidence, however, or authorities given bearing upon this point, we for the present disregard it and give our entire attention to the first ground, namely, as to the constitutionality of the act. It is contended by counsel on behalf of the defendant that if § 7 of the act is unconstitutional, the whole act fatally offends against the Constitution, and that the whole proceedings should therefore fall. We cannot determine this at this time. The only question before us is whether or not the issue was properly brought into this court. There is no question that the defendant or appellant literally obeyed the provisions of the act, but as the Con-

stitution provides that leave of the appellate court or a judge thereof must be first obtained, the question is a serious one whether or not this provision at least is not in serious conflict with the constitutional provision. The identical question has been decided by the Superior Court in *Com. vs. Luckey*, 31 Pa. Super. Ct. 441, where a similar provision to the act of April 22, 1905 P. L. 284, was declared to be unconstitutional and the lower court reversed. We are inclined to think that the construction of that of the Superior Court upon this part of the Constitution and its infringement by that particular act is sound, although some fairly good points might be made against it' but in any case we regard the decision of the Superior Court as authoritative upon us, and we therefore sustain the motion to quash for this reason only, namely, that § 7 of the act of 1907, under which this proceeding was brought into court, is unconstitutional.

And now, to wit, March 16, 1909, for reasons just given, the rule is made absolute.

From S. D. Gettig, Esq., Bellefonte, Pr.

A hospital maintained by a railroad for the benefit of its employees, to which they are required to contribute, is held, in *Phillips vs. St. Louis & S. F. R. Co.* 211 Mo. 419, 111 S. W. 109, 17 L.R.D. (N.S.) 1167, not to be a charitable institution within the rule that exempts such institutions from liability for negligence.

A covenant in a deed that the grantor has a good and perfect title, if untrue, is held, in *Webb vs. Wheeler* (Neb.) 114 N. W. 636, 17 L.R.A. (N.S.) 1178, to be broken when made, and a right of action to accrue thereon at once.

A vendee's right of action against a vendor for breach of warranty of title is held in *Brooks vs. Muhl*, 104 Minn. 404, 116 N. W. 931, 17 L.R.A. (N.S.) 1195, not to date from the time when the deed was delivered, so as to be barred by the statute of limitations at the end of six years thereafter.

In the Court of Quarter Sessions of Centre County

No. 78 February Sessions, 1908.

Rule on the defendant to show cause why he should not support his son.

UNION TOWNSHIP OVERSEERS VS. IRWIN.

Poor Laws—Parent and Child—Support of Son.

Where a pauper son who has been supported by his father, escapes and is declared insane by the authorities and sent to a state insane asylum, the father, a tenant farmer with little more financial ability than to support himself and wife, will not be compelled to contribute to the support of his son in the asylum.

Mr. J. A. B. Miller, for plaintiff.

Messers D. F. & D. P. Fortney, for defendant.

Opinion by Orvis, P. J., January 23, 1909.

After examining the record as well as carefully reading the testimony, we have grave doubts as to our jurisdiction in this particular proceeding. We certainly do not believe that under all the circumstances this court has power to stay proceedings in the common pleas. As the matter of jurisdiction has not been raised or argued we will not pass upon this question directly, but will make our conclusions of law and fact so that as far as possible we can adjudicate this matter so as to save the parties any further cost if possible. The taking of this large amount of testimony is sufficiently burdensome without forcing them to duplicate the matter because of the mere technicality.

While no reference was made in the evidence to the action at law pending in the court of common pleas brought by the respondent against the petitioner, yet we were asked and did make an order in our rule staying further proceeding, pending the disposition of this rule. We would surmise that the respondent had brought suit to recover money for some cause of action germane to present question. The court of common pleas certainly under ordinary circumstances would have no jurisdiction, as this is placed in the court of quarter session. Suit might be brought and maintained upon an express contract. If the respondent relies upon such contract, he has a right to so do, but our suggestion is that unless an express contract be shown that proceedings in the common pleas be voluntarily stayed.

The difficulty in disposing of the main question, namely, as to the support of Holland Irwin by the respondent, has been complicated by the fact that the circumstances have entirely changed since the taking of the testimony by petitioner. At that time Holland Irwin was living at home with his father, and the cost of his maintenance on a farm however humble the style of living, would be merely nominal. Under the evidence as then adduced we would hesitate to make an order compelling the township to support Holland, but comparatively recently Holland escaped from his father's control, made himself a cause of disturbance and terror, and was committed to the county jail. There upon the petition of the sheriff, a commission carefully selected passed upon his mental condition and recommended that he be confined in an asylum, as it was not safe, either for himself or the community to let him at large. Whereupon the court made an order committing him to the asylum at Danville. Since this state of facts the respondent took further testimony to show that he would be unable to pay the money for the maintenance of his son at the Danville asylum. The petitioners have apparently acquiesced in this situation. We therefore find that the poor district of Union should bear the expenses of maintaining Holland Irwin at the Danville asylum from the time of his commitment, as well as the expenses of the same. This being so it clearly follows that the poor district should not pay Irwin any additional sum. He is now relieved from the maintenance of anyone but his wife and himself, and we are of the opinion that though he has no property, either real or personal, he is so situated as a tenant farmer and has sufficient strength to perform this duty.

And now, to wit, January 23, 1909, the rule heretofore issued is discharged subject to the modified order made in our general opinion, and subject to be reconsidered at any time as the facts may warrant the same, costs to be paid by the petitioners.

From S. D. Gettig, Esq., Bellefonte, Pa.

That payment of part of a matured mortgage debt may constitute a consideration for the release of the whole of it is declared in *Frye vs. Hubbell*, 74 N. H. 358, 68 Atl. 325, 17 L.R.A. (N. S.) 1197

In the Court of Common Pleas of Lackawanna County.

No. 331 March Term, 1909.

Rule to Quash Writ of Foreign Attachment.

**MILLVAINE ADJUSTMENT CO. VS. HACKETT,
CARHART & COMPANY.**

In a suit against a copartnership or corporation doing business in another state to merely say that it "is a foreign corporation" is not sufficient for the purpose of the action. The substance matter as regards the corporation must be more clearly shown and its identity more definitely established.

To merely say that a copartnership or corporation is "doing business in the state of New York" falls very short of saying that its constituent members are non-residents of this state. It's a matter of no consequence where the business of the partnership may be done, or whether it is doing business at all. Where its members have their residence may be of consequence. It is at least vital in such an action that they should be non-residents of this commonwealth. Where such an essential detail is omitted the writ becomes irregular.

Mr. C. A. Battenberg, for plaintiff.

Messrs. Leach & Morrow, for defendant.

Opinion by Newcomb, A. L. J., June 28, 1909.

This action is assumpsit. Appearing specially for that purpose defendant moves to quash. If the motion were to dissolve the lien of the attachment it would be free from difficulty. That is so because the claim is not only vague and obscure as regards the subject matter, but very uncertain in respect to any partnership liability of the defendants, in which capacity it would appear they are sued. The affidavit of the cause of action was filed with the praecipe for the writ. It is that which is challenged by the motion.

As regards the power to quash, this writ stands on the same footing as a summons or other original process. It can be exercised only where the proceedings are irregular, defective or improper; Crawford vs. Stewart, 38 Pa., 34; Steel, et al., vs. Goodwin, 113 Pa., 288; Nicoll vs. McCaffrey, 1 Pa. Sup. Ct., 187. That is to say, for a defect inherent in the proceeding from the start. While attachment of goods to compel an appearance to a personal action was a common law process, its operation is limited by the act of 1836 to certain specific conditions of fact. As regards the defendant, a foreign attachment is *prima facie* a proceeding *in rem*, and is granted

only against non-resident debtors, not being within the county in which the writ issues. It is competent for the defendant or his garnishee to controvert the plaintiff's claim in that particular and oust the jurisdiction upon proof that he is not within those provisions of the statute. That it is essential for the plaintiff to show by his affidavit the jurisdictional fact of non-residence is open to no question. True, there being nothing in the statute requiring proof of non-residence as a condition precedent to the writ, in the absence of any preliminary affidavit the presumption would be in favor of the regularity of the writ. But the presumption will continue only until the plaintiff is called upon to show cause of action. Undoubtedly he must then show the fact of non-residence affirmatively. But by electing to file its affidavit in the first instance the plaintiff here saw fit to anticipate a demand that cause be shown. That dispensed with the presumption and the question now is upon plaintiff's *ex parte* proof. By that it would have to stand or fall if the motion were to dissolve the lien. There is no apparent reason why the same should not be true on a motion to quash. We turn then to the cause of action as set forth in the affidavit in this case.

According to the praecipe and writ suit was brought against Corcellus H. Hackett and four others "copartners trading under the firm name of Hackett, Carhart and Company." This conforms with the caption of the affidavit, which was taken by a notary public in the city of New York, the venue being laid in that county and state. It avers, first, that the plaintiff is a corporation of the state of New York; second, "that the defendant company is a partnership, doing business in the city and state of New York, and is a foreign corporation."

That is all and singular the averment on the subject of the defendant or defendants, as the case may be.

If it was intended to sue a corporation, either the place of its domicile should have been stated or else that it was not a corporation of this commonwealth. To say merely that it "is a foreign corporation" is nothing to the purpose when it is borne in mind that the affidavit was taken in a foreign jurisdiction. For, if the attempt be made to aid the affidavit by intendment its more natural import is that as regards the jurisdiction where its venue was laid "the defendant company x x x is a foreign corporation." As such, for

anything that appears to the contrary, its domicile may be in Pennsylvania.

But the action is against several persons joined as copartners. In such case to say of the partnership that it "is doing business in the city of New York", falls very far short of saying that its constituent members are non-residents of this state. It is a matter of no consequence where the business of the partnership may be done, or whether it is doing business at all. Where its members have their residence may be of consequence. It is, at least, vital that they should be non-residents of this commonwealth. Upon that essential point the affidavit is silent. Had it been necessary for the plaintiff to move the court for leave to sue, on such showing the application would have to be denied. It would seem to follow that the writ was irregularly issued and for that reason the rule to show cause is made absolute and the writ is quashed.

The right of the legislator to require a police judge to notify the county attorney of the fact of violations of the prohibitory liquor law which comes to his notice or knowledge, and to furnish the county attorney the names of the witnesses by whom such violations may be proved, under penalty of a fine and forfeiture of his office, is sustained in *State vs. Keener* (Kan.) 97 Pac. 860, 19 L.R.A. (N.S.) 615.

An acknowledgment by the plaintiff of satisfaction against two of several defendants, who are sued as joint wrongdoers, is held, in *Ednes vs. Fletcher* (Kan.) 98 Pac. 784, 19 L.R.A. (N.S.) 618, not to release the others, where the instrument offered to show such release shows that it was not intended to have such effect.

The motorman of an electric car which passes immediately in front of a fire-engine house is held, in *Dole vs. New Orleans R. & Light Co.* 121 La. 945, 46 So. 929, 19 L.R.A. (N.S.) 623, to be guilty of double negligence when he drives the car at full speed in approaching such house, and fails to see, in time to enable him to stop the car and avoid collision with an outcoming hose wagon, a signal given while his car is 144 feet distant from the engine house.

In the Court of Common Pleas of Carbon County.

No. 17 April Term, 1908.

BUTLER VS. KEMMERER.

1. When the question in issue in the first suit is identical with the question in issue in the second suit, and the parties are the same, the first suit is *Res Judicata*.
2. Where there exists the relation of master and servant between the plaintiff and the defendant, and a fixed rate of compensation is agreed upon, the employer is entitled to every minute of the employee's time that is usual in the employment, unless there is a special contract to the contrary.
3. When there is a fixed contract entered into between an employer and his employee, at a fixed rate of compensation by the week or by the month or year, and the employee enters the service of the employer and receives his compensation at stated times according to the contract, the presumption is that the compensation covers all the compensation to which the employee is entitled. There is no presumption that the employee is to receive any compensation for work done for his employer outside of the compensation agreed upon; and, before the employee can recover extra compensation, he must prove that there was a contract for extra compensation. The mere fact that the amount of his duties was increased, or that he was to perform duties which he did not have to perform when he first entered the employ of his employer, would not of itself entitle the employee to additional compensation.
4. Where there is a fixed contract between the parties, the law does not imply any other contract or any additional contract, the burden is upon the party who alleges it to prove it.

EDWARD HARVEY,
LAIRD H. BARBER,
FREDERICK BERTOLETT,

For the Plaintiff.

W. W. WATSON,
FREYMAN & NOTHSTEIN,
JOHN MCGARHEN,

For the Defendant.

In 1905, H. A. Butler brought suit in *Assumpsit* in the Court of Common Pleas of Carbon County against M. S. Kemmerer to recover the sum of \$75,000 upon an alleged verbal agreement with Mr. Kemmerer to divide with him on a liberal basis the profits of the Carbon Iron & Steel Company, Limited, for services rendered by him to Mr. Kemmerer in operating the plant of the said Iron & Steel Co. Mr. Butler was, at the time of the alleged verbal agreement and thereafter, till the suit was brought, in the employ of Mr. Kemmerer as his secretary, for which he was paid a stated monthly salary.

The Court left the jury to say whether or not the uncontradicted evidence of the plaintiff constituted a binding contract between the plaintiff and the defendant. The jury found that there was a binding contract between them, and rendered a verdict for the plaintiff in the sum of \$35,000. From the judgment entered on the verdict, the defendant took an appeal to the Supreme Court, and that Court reversed the judgment and entered judgment for the defendant (See 218 Pa. 248).

Within one year after judgment was entered for the defendant by the Supreme Court, H. A. Butler brought another suit against M. S. Kemmerer in Assumpsit, and claimed to recover \$75,000 from the defendant for the same services on a Quantum Meruit.

The Court, at the trial of the second suit, held that the plaintiff, in order to recover, must show a special and independent contract with the defendant, and, as no such contract was shown, the plaintiff could not recover, and the Court further held that the former suit and judgment for the defendant was Res Judicata, and, on motion of the plaintiff, directed the jury to find a verdict for the defendant.

The facts and law are stated in the following charge or opinion by President Judge Heydt, before whom both cases were tried.

Reported by W. W. Watson of the Lackawanna Bar.

JUDGE'S CHARGE TO THE JURY.

Gentlemen of the jury: Each side has submitted one Point, in the language of which I am requested to instruct you. The plaintiff's point is under the law and the evidence the verdict must be in favor of the plaintiff. This is refused.

The defendant's point is, that under the evidence in the case and the law the plaintiff cannot recover, and requests the court to give the jury binding instructions to find a verdict for the defendant. That point is affirmed. That would render it unnecessary for me to say anything at all further to you about this case; since it relieves you entirely from a consideration of the case.

But, since you have listened to the testimony, and, no doubt, have taken an interest in this case, it is only fair that the Court should state to you the reasons why the Court gives this binding instruction for the defendant.

The plaintiff, H. A. Butler, had brought suit against M. S. Kemmerer, the defendant, to No. 24 October Term, 1905 in this Court. In that suit he claimed to recover \$70,000.00. He claimed to recover for services rendered by Mr. Hutler to Mr. Kemmerer during the term beginning September 1893, and up to the time when he left his employ, in September 1905. Upon the trial of that case the Court was of the opinion that, because the contract depended upon oral testimony, the question whether or not there was a contract between these men was a question for the jury to decide; and I then submitted that question to the jury. The jury found a verdict in favor of the plaintiff for a large sum. The defendant then took an appeal to the

Supreme Court of Pennsylvania; and the Supreme Court reversed the judgment which had been entered upon the verdict; and said, that the Court should have entered a compulsory non suit when the defendant asked for it.

In the present suit we have the same parties—that is the plaintiff is H. A. Butler and the defendant is M. S. Kemmerer. The suit is brought to recover the value of services rendered during the same period of time, to wit: from September 1893 to September 1905. In this suit the plaintiff does not claim to recover upon an express contract, but he seeks to recover upon what the lawyers call, a quantum meruit. Quantum meruit means literally "so much as he deserved". That is, the plaintiff seeks to recover what the services which he rendered to the defendant were reasonably worth. The testimony upon the former trial was substantially the same as it was upon this trial. You have heard of what the services consisted, and it is not necessary for me to take any time to review them.

The Court is of the opinion that the question in issue in the first suit is identical with the question in issue in the present suit. That is, that the subject matter, which forms the basis upon which recovery was sought in the first suit, was the same as the object matter which forms the basis upon which recovery is sought in this suit—to wit: the services rendered by the plaintiff to the defendant. And I am of the opinion that the verdict in the first suit was an adjudication of those matters between the plaintiff and the defendant.

The Supreme Court reversed the judgment without a Venire. They also did not discuss any of the assignments of error, except those relating to the question of the contract—which is, at least, some indication that the Supreme Court did not suppose that this case would be tried again. But that can make no difference to this jury.

In the next place, I am of the opinion that the decision of the Supreme Court in the first case, in terms, disposes of this suit. The Supreme Court said, (Pa. St. 218 P. 218), "we have said more than once, it was not the reasonable value of services rendered which was in dispute. The plaintiff received that in the salaries and other compensation given him. It was the basis for the payment of the bonus, or division of the profit, which was left vague, uncertain and undetermined."

I am further of the opinion that, independent of the first suit, the plaintiff is not entitled to recover under the law. Between this plaintiff and this defendant there existed the relationship of master and servant. There was a contract of hiring, by which the plaintiff agreed to render his services as private secretary to the defendant, at a fixed rate of compensation agreed upon.

Now it is the rule of law that when one persons enters the employment of another, the employer is entitled to all the time and labor of his servant. That does not mean that the employer would be entitled to every minute of his time; but to so much of the time of the employee as is usual in the employment. It might raise a question whether a man was at work on Sundays or not. That would depend upon the nature of the employment. If you would hire a man as conductor on a steam roadway and pay him a monthly salary, the employee would be bound to work on Sundays, because in that employment men work on Sundays. If you were to employ a man as a dry goods clerk he would not be bound to work on Sundays, because clerks in dry goods stores do not usually work on Sundays. The same would be true of the number of hours a person would be employed. It would depend upon the nature of the employment. But generally speaking, the employer is entitled to all the time and labor of his employee, unless there is a special contract to the contrary. When there is a fixed contract entered into between an employer and his employee, at a fixed rate of compensation, by the week or by the month or year, and the employee enters the service of the employer and receives his compensation at stated times, according to the contract, the presumption is that that compensation covers all the compensation to which the employee is entitled. And this for the reason, that the presumption of law is that when an employee is dissatisfied with what he is getting, he will either quit or will meet his employer and make different arrangements. When there is a contract of hiring at a specified rate of compensation per week, or month or year, that is a contract. Now there is no presumption that the employee is to receive any compensation for work done for his employer, outside of the compensation agreed upon. And before the employee can recover extra compensation, he must prove that there was a contract for such extra compensation. The mere fact that the

amount of his duties was increased, or that he was to perform duties which he did not have to perform when he first entered the employ of his employer, would not of itself entitle the employer to additional compensation.

For example, if one of you gentlemen were living in a town, and you would hire a man to take care of a pair of horses in town; and you would pay him \$20.00 a month for his services, you would have to pay the \$20.00 a month because you agreed to do that; and it would not make any difference whether the employee was busy or engaged one hour or two or ten hours per day. Now, suppose, after this hired man had lived with you for, we will say a year, you would change your mind and would move out of town upon a farm, and there you would have a lot of work, and your hired man would go along with you, and there he would plow and harrow and use the different kinds of machines, and make hay and all that sort of work that is common to farm life; but you would continue to pay his salary at \$20.00 a month regularly, and he accepted it; he could not at the end of the year sue you for either compensation, salary, or for services for extra labor, because you would be entitled to all his services, for what he agreed to do it for, and for all his time, and the fact that he accepted the salary which had been agreed upon would preclude him from recovering either extra salary or compensation for extra services. The best standard to determine what the services of the employee to the employer are worth, is the rate of compensation which they agreed upon and fixed between themselves. And when they have fixed it, both sides are bound by it. And it is not a question of whether the employee has an easy job; whether he gets less salary than he earns, or whether he earns more salary than he gets. Where one performs service for another at the other's instance and request, and the amount of compensation to be paid is left undetermined, then, if they cannot agree upon the compensation, the employee can recover from his employer what those services were reasonably worth. Because the law implies a promise upon the part of the employer, that he would pay what those services were reasonably worth.

But when there is a fixed contract between parties, there the law does not imply any other contract, or any additional contract. And

the burden is upon the party who alleges it to prove it. Now, applying these principles to the case at bar. In 1887 Mr. Butler went into the employ of Mr. Kemmerer as private secretary, at a fixed salary of \$1500 a year. You have heard what his duties were under that hiring, and what he actually did. That salary was paid in monthly instalments regularly. In 1893 Mr. Butler had some conversation with Mr. Kemmerer—that he was going to leave or was not satisfied, and was trying to get a different arrangement. It is not necessary for me to review that, you have heard all that. The fact was Mr. Butler continued in the employ of Mr. Kemmerer, that he received his salary at regular intervals, monthly. His salary was increased from time to time, but he received his salary in monthly instalments regularly. That is not disputed. Mr. Butler admits that. The burden is upon him to establish that there was a contract outside the contract of hiring, outside of what he was bound to do under his office of secretary to Mr. Kemmerer.

I am of the opinion that he has not proved any such contract. That no such contract exists was definitely established in the first suit—because, if nothing else was established in that suit, it was established that there was no contract existing between these parties.

Mr. Butler, having failed to prove that there was a contract for services outside of his regular employment, he cannot recover in this suit. That the services which Mr. Butler rendered to Mr. Kemmerer were valuable to Mr. Kemmerer, you would probably have no trouble in finding. You may even be of the opinion that Mr. Kemmerer induced Mr. Butler to stay; and that he left him under the impression that he would compensate him in some way or other for special services rendered. But the fact is that there was no contract. It would be an open question also whether Mr. Kemmerer treated Mr. Butler liberally in the way of extra compensation, in what, the defence claims, were given to Mr. Butler as compensation by way of salaries from the allied interests of Mr. Kemmerer. That is not material in this case.

Those are the reasons, in a general way, why I am of the opinion that the plaintiff is not entitled to recover in this suit, and why I gave you binding instructions for the defendant.

In the Court of Common Pleas of Lackawanna County.

No. 249 September Term, 1907.

Rule for Judgment Non Obstante Veredicto.

Rule for a New Trial.

MARTHA E. BARBER VS. GEORGE F. BARBER.

Divorce—Binding Instructions—Desertion as a ground for decree of divorce—defenses to decree.

Where a wife sues her husband for a divorce, on the plea of desertion, and judgment is rendered in favor of the husband, court will not set aside the verdict of the jury on a rule for judgment non obstante veredicto, but will leave to the jury the question of whether the desertion was willful and deliberate on the part of the husband. In such cases the husband must prove his contention and the justice of his defense, and the reasonable cause of his desertion must be such as would entitle him to a divorce.

Messrs. John F. Scragg and E. H. Thayer, for plaintiff.

Messrs. M. J. Martin, I. H. Burns, Joseph O'Brien and Ralph W. Rymer, for defendant.

Opinion by Edwards, P. J. June 28, 1909.

The verdict of the jury in this case was in favor of the defendant. Plaintiff presented a request for binding instruction in her favor, and she now claims that on the whole record we should enter judgment for her notwithstanding the verdict. *Hardie vs. Hardie*, 162 Pa., 227, is authority for the proposition that a judge may give binding instruction in favor of the plaintiff in a divorce case as well as in other cases, when the facts justify such instruction; but in the *Hardie* case the court below was reversed, because, under the particular facts of that case, it was for the jury to decide whether or not the desertion was willful and malicious. Plaintiff's counsel contends that in the case at bar there are no complications in the facts, and, that if the defendant failed in his justification of the desertion, the plaintiff was entitled to binding instruction. While the argument in favor of this contention seems plausible, we do not see our way clear to enter judgment for the plaintiff. As we have decided to grant a new trial, which means another trial of the case, a discussion of the reasons why we cannot enter judgment non obstante verdicts would be premature.

As to the rule for a new trial we find no difficulty in making this rule absolute. The desertion complained of by the plaintiff occurred in 1897 and had been persisted in for a period of ten years before the bringing of the suit. Defendant justified the desertion on two grounds: (1), cruel and barbarous treatment on the part of the wife; (2), indignities to the person of the husband. The evidence on the part of the husband was insufficient to sustain either of his contentions. Our appellate courts have decided many times that "if there is one thing settled in the law of divorce, it is that the reasonable cause which will justify a desertion must be such as will authorize a dissolution of the marriage bonds." Tested by this standard, the defendant has failed in his defence and the jury should have been so instructed. The second and third requests of plaintiff should have been allowed.

Now, June 28, 1909, the rule for judgment non obstant veredicto is discharged; the rule for a new trial is made absolute and a new trial is awarded.

Mandamus is held, in *State ex rel. Moyer vs. Baldwin*, 77 Ohio St. 532, 83 N. E. 907, 12 A. & E. Ann. Cas. 10, 19 L.R.A. (N.S.) 49, to be the proper remedy to restore a party to the possession of an office from which he has been illegally removed. The other authorities on the question of mandamus to restore to office one who has been illegally removed are collated in an exhaustive note to this case.

That interest may be added to the amount of recovery on a bond, although the total sum is thereby made to exceed the penalty of the bond, is held in *American Surety Co. vs. Pacific Surety Co.* (Conn.) 70 Atl. 584, 19 L.R.A. (N.S.) 83.

The conveyance by a life tenant, in whom the reversion in fee has vested as heir, of the life estate and the reversion, is held, in *Bond vs. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L.R.A. (N.S.) 540, to merge the life estate in the fee and cut off contingent remainders limited upon the life estate.

IN MEMORIAM

ACTION OF THE LACKAWANNA BAR UPON THE DEATH OF FRANK J. FITZSIMMONS, AUGUST 17, 1909.

At a largely attended meeting of the members of the Lackawanna County Bar, President H. M. Edwards, presiding and Robert J. Murray, Esq., acting as secretary, the following resolutions were adopted and ordered spread on the minutes of the Court and a copy of the same sent out to the relatives of the deceased:

THE RESOLUTIONS.

Frank Fitzsimmons was the son of Hugh and Rose Fitzsimmons, and was born in Fell township, September 20, 1853. His parents were of that sturdy Irish stock of the North of Ireland, who came to Carbondale more than half a century ago. At an early age his parents moved to Farview, and here on a farm he spent his childhood and early manhood. It may be said that these early years spent on the farm left an indelible impression on his mind and character and he loved to refer to these days all through life. From the very first he was compelled to see for himself and he may be said to have been the architect of his entire career and fortune. Being of an ambitious and studious turn of mind, he began to prepare early for an education. He matriculated at Manhattan academy, in New York, and then prepared for Villa Nova college, where he distinguished himself in the classics and his historical studies, and graduated with distinction. During his career in college he was a leader in intercollegiate debates and both by his personal charms and brilliant mind made a profound impression on the faculty of that institution as well as upon the student body.

Upon leaving college he entered the office of D. L. O'Neil, esq., of the old Luzerne bar at Wilkes-Barre, and was admitted to the bar of Luzerne county in 1878. He at once gave the greatest promise of a distinguished career at the bar, and was conspicuous for his forensic powers before the court and jury.

It may be said, however, that it was before a jury that he showed to particular advantage, where, with an eloquence so characteristic of his race and equipped as he was with a splendid literary education, his keen wit and strong sense of humor were especially powerful in snatching victory where defeat looked certain.

ALWAYS WITH CREDIT.

Upon the organization of Lackawanna county he took up his residence and began his professional career in the city of Scranton. During his career as a member of the Lackawanna bar he appeared in some of the most important cases in the criminal as well as the civil courts, and always with credit to himself as well as to his profession.

The political career of Frank Fitzsimmons is an essential part of the political history of the commonwealth. His keen judgment of men, his charming personal manner and his great oratorical powers made his presence felt at political conventions and in the caucuses of his party, where his services were always in great demand.

For a number of years he had been editor and proprietor of the LACKAWANNA JURIST, the legal periodical of this county, and his well-known courtesy and civility to the members is well known.

No misfortune or set-back could dull his cheerful nature. Colonel Fitzsimmons believed that laughter and good cheer did more to strengthen the weak, rest the weary and elevate the fallen than did sermons and lectures, and as he traveled life's pathway he was continuously strewing the flowers of good cheer in the pathways of all. Intellectually, he was a giant among men.

He was a devoted son, and his aged and venerable mother's care and comfort was of the tenderest solicitude to him, and to her and his brothers and sisters, the Lackawanna bar, and to the public his death will leave a scar which only time can effect.

Resolved, That this minute be spread upon the record of the Lackawanna Bar association and a copy of the same be sent to his surviving family, to whom sympathy is extended in their bereavement.

Upon taking the chair, Judge Edwards announced the object of the meeting and, among other things said:

"The death of Colonel Fitzsimmons, while not unexpected is a source of profound grief to all the members of the bar. He was such a delightful companion, so genial and companionable that we seem to feel the loss of his sunshine because he has left us. A star of more than ordinary brilliancy has disappeared from our firmament and we feel oppressed by the cloud that hangs over us today. We shall miss the friendly smile, the pleasant greeting, the happy bon mot. Our recollections of Frank Fitzsimmons will be like a benediction in the years to come."

Judge Newcomb expressed his feelings by saying that Colonel Fitzsimmons was a charming companion, a delightful entertainer and will be sadly missed. Judge O'Neill in his eulogy said: "He possessed the happy faculty of looking at life with optimistic views. There is nothing that can be added to his career as a lawyer, scholar and man." After the others had spoken, Judge Edwards appointed John M. Harris, Joseph O'Brien and Cornelius Comegys a committee to prepare resolutions. The committee's report follows:

Judge O'Neil counted his acquaintance with Colonel Fitzsimmons one of the pleasantest of his life. "He was full of cheerfulness," he said, "all through his life. It often happened that we were not of the same opinion, but we never lost that mutual regard and friendship between us. He possessed the happy faculty of looking at life with optimistic views. There is nothing that can be added to his career as a lawyer, a scholar and man."

John M. Harris spoke the following tribute in memory of Colonel Fitzsimmons, after which Judge Edwards appointed Judge O'Neil, District Attorney O'Brien and John M. Harris a committee to attend the funeral at Carbondale Friday morning as the representatives of the bar association.

"For more than twenty years, I had the good fortune to enjoy the friendship and confidence of Frank J. Fitzsimmons. During those years I had ample opportunity to become acquainted with his charming and interesting personality. His activities in politics, county, state and nation had enriched his mind with a fund of anecdote and reminiscences of the great men of the Democratic party, and he forgot nothing worth remembering. While he was never inclined to judge persons harshly, for his was a most generous heart, still he

could define a person's limitations as a man and a lawyer with unerring accuracy, and that too, in a single paragraph, and his estimate to my thinking was always correct. Frank Fitzsimmons possessed a fine literary education. His education was classical in the best sense of that term. He knew intimately the entire range of English literature and he loved to trace the influence of the Celtic races on the civilization and literature of the British Isles. His favorite studies were history and poetry, and he read history with that rare intelligence that is capable of seeing the relation of succeeding events in a general scheme of civilization. His favorite English historians were MacCaulay and Green, not to mention Gibson. His memory was stored with the richest of English poetry, and he never failed to bring to his aid, during a convention, a fitting quotation from one of his favorite poets.

"Writing maketh an exact man and conference a ready man," saith Bacon, and our lamented friend did enough of both to make him conspicuous among his contemporaries as a graceful and elegant writer, and a ready forceful orator, whether on the hustings or in the banquet hall.

"He enjoyed for nearly a third of a century, the acquaintance of the leading tragedians and comedians of the American stage, and he was ever their champion in proclaiming the influence of the legitimate drama on society.

"As to 'mastering the lawless science of law; that wilderness of single instances in which few by wit or wisdom lead, beat out a path to wealth and fame,' it may be said that while he had a splendid knowledge of substantive law and his brilliant mind enabled him in the trial of a case to see the main issue involved and to drive that issue home with much force and wit to the jury, still the painstaking drudgery of the profession never seriously engaged his time nor his energies.

"He was a devoted son, and his old mother's comfort and happiness were very dear to his heart, and often when I inquired during the week if I might see him on Sunday, he would smile and reply, 'No, John, my boy, I am going to Carbondale on Sunday morning to see my dear old mother.'

"He was an American to the core. He considered the American at his best, the highest type of the race, and loved to dwell at length upon the careers of the giants of the American bench and bar, and the great statesmen and orators who had in each generation been the leaders of their respective parties in congress and the senate. He believed in the great destiny of the American people and argued that this nation had done more for the freedom and general welfare of mankind in a single century of her history than the nations of Europe had done in a thousand years.

"If we have any traditions at this bar, Frank Fitzsimmons helped to make them, and his death removes one of the most interesting personalities of its history. Personally, I feel that his passing away has left a great gap in my life, and I feel very lonely, indeed."

Attorney John M. McCourt in paying tribute to the memory of Colonel Fitzsimmons delivered the following address.

"Mr. Chairman and Gentlemen of the Bar: I was eleven years of age when I entered Colonel Fitzsimmon's office. I left it sixteen years later to enter my own. Practically every day of that period was spent in his company and during that time I learned to love him with an affection keener than that of friendship. To Colonel Fitzsimmons I am indebted for more than I could ever repay. My memory is on its knees beside the dust of my teacher and my friend. Every fault he possessed was known to me and with each fault now present in my mind I cherish with gratitude the memory of a good man.

"Colonel Fitzsimmons was the lonliest man I ever knew and sometimes the most unhappy. The commonest contentments which are the inherent right of even the most humdrum existence he never tasted. For over thirty years he occupied the same little hotel room looking out on slate roofs and grey streets. There every evening during my youth and early manhood, I sought him out to delight in the glory of his diction, the geniality of his humor and the treasures of his well stored mind. That was my university.

"Colonel Fitzsimmons was the most brilliant man I ever knew. You all recall his transcendent genius as an orator and many here present have beheld him stampeding an ugly and hostile convention to his way of thinking with his irresistible eloquence. But it was in

the quieter paths of literary attainment that we will most lovingly invoke his memory: Shall we forget his post-prandial response to the toast "The Ladies", his essay on "Music", his prose wreath to the memory of "Bobbie Burns", his tribute to "The Land of Our Fathers"? As a writer he was one of the best this valley has produced. His "Pastime Jottings", commenced long before I knew him and later dictated to me, were a perfect type of his marvelous gifts as a commentator, biographer and stylist, and whosoever in the future shall lift his ambitious pen to write the history of Lackawanna and her children will find in "Pastime Jottings" not only a lamp for his rhetoric but a wealth of historical memoirs and personal reminiscences narrated with all the charm and vividness of romance.

"His humor was as exquisite as his mastery of the English language was perfect. Even in the most spontaneous and unstudied conversation Colonel Fitzsimmons selected his phrases with confidence and authority and each word fitted the other like a mosaic. His conversation was so warmed and tinted by his delightful wit and adorned by his perfect rhetoric that the narration of the most commonplace incident made him as delightful a companion as his constancy and loyalty made him a treasured friend.

"In the mere business of the law Colonel Fitzsimmons never attained the place that was properly his own because the grind and drudgery of legal details were distasteful to him. He was too diffident and too kindly to find pleasure in the rough and tumble battles of the legal forum but when he did appear before a jury everything gave way to the impulse of his logic and the persuasiveness of his eloquence. It was as a counsellor that Colonel Fitzsimmons was most successful in his profession and men whose wealth is counted by millions and whose fame is not bounded by the confines of any state listened eagerly to his advice.

"Mr. Chairman, eighteen years ago in this room Colonel Fitzsimmons paid tribute to the memory of his law associate, a member of this bar, my dead brother. His words on that occasion I still recall and I repeat them when I express with all my heart the hope 'that the earth will rest lightly on so true a heart'."

In the Court of Common Pleas of Lackawanna County.

No. 1027 September Term, 1908.

Rule to Open Judgment.

NELLIE E. SEAMANS VS. JAMES S. PORTEUS.

Promissory Note—Seal—Statement of Limitations.

Where a person sues on a promissory note which confesses judgment, but is not under seal, and the maker moves to open judgment and to be allowed to enter as a plea the statute of limitations; the endorsement of credits on the note will not toll the statute of limitations when the uncontradicted testimony shows that the receipt of payments endorsed on note were purely voluntary endorsements.

In such a case a rule to open judgment and to plead the statute is properly granted.

Mr. William H. Roe, for plaintiff.

Opinion by Newcomb. A. L. J. June 28, 1909.

This is a D. S. B. judgment founded on defendant's warrant of attorney. The instrument is a promissory note for two hundred dollars dated August 29, 1896, at one year, and is not under seal. Defendant moves to have the judgment opened to let in the plea of the statute of limitations. It differs only in one respect from a similar case between the same parties to No. 1028, same term, in which an order opening the judgment is made at this time. The present note bears endorsements of two credits, one in 1906 and the other in 1908, thus apparently telling the bar of the statute. But the uncontradicted testimony of the defendant is that they represent no payments and are purely voluntary endorsements. Denying that any demand has been made on plaintiff's part, or acknowledgment or promise on his own, since the maturity of the note, and that being uncontradicted, the case assumes substantially the same character as the one referred to. For the reasons therein stated the rule is accordingly made absolute and the judgment opened.

The issue to be made up of the note to stand as plaintiff's declaration to which the plea shall be the statute of limitations.

The record of a deed is held, in McClerry vs. Lewis (Me.) 70 Atl. 540, 19 L.R.A. (N.S.) 438, not to be admissible to prove its existence, on behalf of the grantee claiming under it

In an action for damages for breach of contract by a railway company to transport a corpse over its line to a particular point, delivering it there to an intersecting carrier, to be conveyed to its place of destination, the breach consisting in the negligence of the company's agents and servants in carrying the corps beyond the connecting point, thus causing a delay of twenty-four hours in the funeral arrangements, it is held, in *Beaulieu vs. Great Northern R. Co.* 103 Minn. 47, 114 N. W. 353, 19 L.R.A. (N.S.) 564, that, in the absence of wilful or malicious misconduct on the part of the company or its agents, damages for the mental anguish cannot be recovered.

A telegraph company which fails promptly to transmit money sent by a father to secure the forwarding of the corpse of his daughter for burial is held, in *Cumberland Teleph. & Teleg. Co. v. Quigley (Ky.)* 112 S. W. 897, 19 L.R.A. (N.S.) 575, to be liable to him for mental pain and anguish by reason of the delay in shipment of the corpse and for loss of time and expenditure of money thereby caused.

The right of the owner of negotiable paper which is indorsed in blank and deposited in a receptacle in a bank for safe-keeping are held, in *Voss vs. Chamberlain (Iowa)* 117 N. W. 269, 19 L.R.A. (N. S.) 106, to be inferior to those of a transferee for value without notice in due course of business, from a bank official who wrongfully misappropriates the paper and uses it for purposes of his own.

After issues have been framed covering all the grounds relied on in a caveat to a will, and sent to a court of law for trial, it is held, *Bennett vs. Bennett*, 106 Md. 122, 66 Atl. 706, 19 L.R.A. (N.S.) 121, that the caveator should not be permitted to dismiss them for the purpose of filing a new caveat, without the consent of the caveatee.

A written renunciation of a devise of an interest in real estate, made the day the will is admitted to probate, is held, in *Bradford vs. Calhoun (Tenn.)* 109 S. W. 502, 19 L.R.A. (N.S.) 595, to defeat a levy upon the property under execution against the devisee.

In the Court of Common Pleas of Lackawanna County.

No. 642 September Term, 1909.

Appeal from Decision of County Commissioners.

In Re: Appeal of Charles F. Hall, &c., Eighth Ward, First District, City of Scranton.

Primary Election—Primary Act of 1906—Requirements of Petition Requesting the County Commissioners to Open the Ballot Boxes and Recount the Votes— Construction of the Primary Election Act of 1906.

Where, at a primary election, a contestant, alleging fraud and submitting proper affidavit, requests the County Commissioners to open the ballot boxes and recount the votes; and, on such petition and affidavits the ballot boxes being open and the votes on the recount corresponding to the regular returns made by the election officers, the duty of the County Commissioners is at an end and they have no power under the law to disallow or reject the entire vote of a district on account of any apparent fraud or mistake.

In such a case the power of the County Commissioners, as a Computing Board, is limited and strictly refined by the Statute, and they have no authority or warrant of law to proceed further; they have only the power either to order or to refuse a recount on proper petition and affidavits filed and presented to them.

Neither, in such cases, is the power of the Court to be stretched by entendment by any words of this Act, but the exercise of the jurisdiction of Court must remain within the law and be such as the law permits; while the Court may have power to correct or purge the vote of any district for palpable fraud or mistake, it has not the power to reject or throw out entirely the vote of any district.

The Primary Act of 1906, explained and construed.

Messrs. A. A. Vosburg & George S. Horn, Attys. for Appellant.

Mr. W. R. Lewis, Contra.

Opinion by Edwards, P. J. July 3, 1909.

This appeal involves a consideration of the Primary Act of 1906.

Section 11 of said act provides, inter alia, as follows:

"Upon petition of ten qualified electors of any county, setting forth that fraud has been committed in any election district of said county, together with a statement of the reasons why an assertion is made, it shall be the duty of the county commissioners to open the ballot box of the said district and to recount the votes. Any person aggrieved by any decision of the county commissioners relative to the counting of the votes may appeal therefrom to the court of com-

mon pleas of the proper county, whose duty it shall be to hear said appeal, and to make such decree as right and justice shall require: Provided, however, that in case of a contest of delegates to a state convention, such contests shall be determined by the State Convention, according to the rules of their respective parties. Contests of primaries shall be originated and conducted as in the case of elections."

The pleadings in the present case begin with the petition and affidavits presented to the county commissioners. These papers constitute a part of the case and are brought before us by the appeal.

Two petitions were submitted to the county commissioners, each petition signed by ten electors of the county. One petition, if in conformity with the act, would have been sufficient to give the commissioners jurisdiction. Both petitions are alike in form, and they aver that fraud had been committed in the first district of the eighth ward of the city of Scranton. The particular fraud alleged relates to the vote for jury commissioner, it being set forth that the votes in said district returned as having been cast for Benjamin Griffiths were cast for George Oram and others, and that C. H. Hall received more votes than were returned for him. The prayer of each petition is "that the ballot box of said district be opened and the votes recounted."

The affidavit of Clark Lowry states that the sealed returns gave J. W. Reidenbach 8 votes, Benjamin Griffiths 75 votes, and Charles Hall 2 votes; whereas, in fact, Reidenbach should have been credited with 80 votes, Griffiths with 3 votes, and Hall with 2 votes. Another affidavit has attached to it a paper designated a "statement of the primary election" for said district. There is nothing in the affidavit to indicate where the paper came from, or how it was obtained. It may have been the paper intended to be posted on the outside of the election booth after the vote was counted. It has no ear-marks of having been posted anywhere; but it is signed by the judge and both inspectors. As to when it was signed and under what circumstances, the affidavit is silent. According to this statement the vote for the office of the jury commissioner is as stated in Mr. Lowry's affidavit.

After considering the petitions and affidavits relating to the count in said district the county commissioners ordered the opening of the ballot box and a recount of the vote. The recount corresponded with

the sealed return, and the vote for the office of jury commissioner was tabulated accordingly.

Looking at the papers as they are before us the question might properly be asked: What is there for the appellant to appeal from? The prayer of his petition was that the ballot box be opened and the vote recounted. The very thing, and everything he asked for, was done. Could, or should, the county commissioners have done more than they did? It was stated by counsel at the argument that because of certain alterations apparent on the face of the return sheets as well as for some other reasons, the commissioners were asked orally to throw out the whole vote of said district for the office of the jury commissioner. Conceding, for the sake of the argument, that such a request was properly before the commissioners, it does not help the appellant; because the commissioners were asked to do that which under the law they had no power to do.

This leads us to consider the limitations of the power of the county commissioners acting as a computing board under the primary law. Very little power is given them under this law, and they have none under any other. They shall, on a certain day, "at noon, publicly commence the computation and canvassing of the returns, and continue the same from day to day until completed." If any of the returns have not been received, the commissioners can issue no process to compel the judges of election to bring in the missing returns. They have no power to order a subpoena nor to award an attachment. If they want this done, they "have the right to petition the court of common pleas for the use of its processes." It appears clearly that the legislature has been explicit in its delegation of power to the county commissioners acting as a canvassing board. The manner in which they acquire jurisdiction to investigate the returns from any district is distinctly specified. There must be a petition of ten qualified electors of the county alleging fraud, "together with a statement of the reasons why such an assertion is made." When such a petition and statement are presented "it shall be the duty of the county commissioners to open the ballot box of the said district and to recount the votes." They can do nothing else because the law does not give them the power to do anything else. They are not a court; they can swear no witnesses; and they can issue no process.

The primary law is new and it has in it several defects; but the judges must interpret the law as it is on the statute book. The writer of this opinion believes the primary act ought to be amended so that all primary election returns should be computed by the court of common pleas in the same manner as the returns of the general election are computed, with the same power to correct the returns.

It appears, therefore, on consideration of the language of section 11 of the primary act, that the power vested in the county commissioners is very limited. They can order a recount of the vote in a given district; or, they can refuse to do so. These are the only "decisions" they can render under the act.

We shall now consider the power of the court on the hearing of the appeal. The primary act provides that "any person aggrieved by any decision of the county commissioners relative to the counting of the votes may appeal therefrom to the court of common pleas x x x whose duty it shall be to hear said appeal, and to make such decree as right and justice shall require."

On this phrase, "such decree as right and justice shall require", appellant's counsel builds his argument. It is claimed that the court by these words is given very extensive powers. If the words are disconnected from their context it is difficult to determine how far a court might or should go; but, it needs no elaborate line of reasoning to make the proposition clear that the decree to be made by the court must be such as the law permits it to make. If we make a decree without authority of law, it will neither be right nor just. We shall have occasion hereinafter to state more fully that the supervisory power of the court over election returns is based upon statutory authority. And the exercise of this authority by the courts has been explained, defined and guarded by very numerous decisions.

How far can the court go in exercising the jurisdiction given to it under the primary law? Can it go further than to order a recount of the vote? It is claimed by the appellant that the court can throw out the whole vote of a district, if "right and justice" require it; and on this point our attention is directed to the case of *In Re Appeal of R. E. Williams*, Luzerne Legal Register, Vol. 14, p. 167. We are of the opinion that under no circumstances can we throw out the whole vote of an election district on the ground of the fraud of the

election officers. We cannot do this when computing the returns of a general election under the law which gives us express authority to correct palpable fraud or mistake; much less can we do it under the primary law, where the only grant of authority vested in us is to be found in the phrase already quoted. While we cannot throw out the whole poll it might be said that we can purge the poll, and allow each candidate to prove his vote. Whatever might be said as to the merit of this proposition we are clear that the claims of the appellant on the points mentioned can be entertained only in a contested election case. It must not be forgotten that the eleventh section of the primary act provides that "contests of primaries shall be originated and conducted as in the case of elections." This provision draws into the primary law all the legislation relating to contested elections. In the case at bar, the substance of the relief prayed for by the appellant, can be obtained by him in contested election proceedings, and in that way only.

Our views on the primary act so far as it relates to the extent of our jurisdiction on such an appeal as is now before us, are necessarily defined and circumscribed by the terms and language of the act itself. The task of interpretation is easy when the language of an act is plain and admits of only one meaning. Where the words of a statute are plainly expressive of an intent, and not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such case, what the consequences may be. On the subject now before us the language of the primary law is clear enough until we reach the phrase, "and to make such decree as right and justice shall require." As an expression embodying a legislative purpose or intent, the phrase is very indefinite. It might mean much or little. Its meaning might vary according to the temperament of each person interpreting it. In our judgment it means no more than the word "proper" would mean if that word were substituted for the phrase. Thus: The court after hearing the appeal shall make a "proper" decree—a decree that would be proper under the facts of the case and under the law applicable thereto.

We shall now examine the allegations contained in appellant's statement of the grounds of his appeal, in order to understand clearly the status of his case. In substance they are as follows:

1. That the returns from the first district of the eighth ward were not made to the county commissioners until late Tuesday afternoon.

2. That one of the inspectors of election was not present when the vote was counted.

3. That there were 233 ballot stubs in the box and only 120 ballots used.

The foregoing averments, three in number, are grouped together, because each standing alone, or the three taken together, are of no probative value in the consideration of this case. The facts asserted may create suspicion; yet, conceding each assertion to be true, not a single vote would be added or taken away from the count of any candidate.

4. That the election officers fraudulently altered the votes and the returns so as to show 8 votes cast for Reidenbach, instead of 80; for Griffiths, 75 instead of 3; Oram 25, and Hall 2.

The tally-sheet and the return-sheet are before us. The tally-sheet shows no alteration of any kind, and the tallies show the total vote as given above and as found in the ballot box. The return-sheet shows an erasure, apparently made by a sharp instrument, on the lines where the total vote is given for Reidenbach and for Griffiths; but there is nothing to indicate what, if anything, had been erased on either line. Let us treat this return as if it were before us under the act of 1899, and we were computing the general election returns. What would happen then? One of two things would happen. We would either sustain the tally-sheet, which is the foundation of the return-sheet; or, we would open the ballot box and recount the vote. There are some decisions against the latter course; but it would be the best and only final relief we could give. Under no circumstances could we throw out the vote of a whole district and thus disfranchise all the voters. Any further relief demanded by a complaining candidate could be obtained only in a contested election proceeding. In the case at bar the ballot box was opened, the vote was recounted and it was found to correspond with the tally-sheet.

5. That the ballots found in the box by the county commissioners were not the same ballots cast by the voters, but that the original ballots had been taken from the box and others substituted by the

election board or by some other person.

This is the most serious allegation made by the appellant. It charges a crime which under the primary act may be punished by a fine of \$1,000 and five years' imprisonment. The allegation is somewhat loosely made. The crime was committed "by the election board or by some other person." Entertaining the highest concern for the integrity of the ballot box and believing that a crime against the elective franchise is the most serious of all crimes, we cannot allow an allegation of this kind to pass unnoticed. Regardless of the interest of rival candidates, we call upon the appellant or his counsel to present to us an affidavit setting forth the facts which will sustain so grave a charge. If this be done, the judges of our court are willing to sit as committing magistrates to hear the charge. If the allegation is without foundation in fact, it should not be made; if true, the crime should be proven and the criminal or criminals punished.

After this digression and coming back to the appellant's case, it appears from the papers in the case and from the statement of counsel at the discussion in court last Monday that the only purpose of the appeal as to the eighth ward district is to secure an order from us throwing out the whole vote of said district. As already stated, there is no warrant of law for such an exercise of power. We cannot do it under the act of 1899 relating to the computation of the returns of general elections, and there are very few instances of its being done even in a contested election proceeding. It is for this reason that we have declined to go into a more formal hearing of the present appeal than the somewhat informal discussion of the case in open court last Monday. Appellant's counsel relies on the case from Luzerne County, already cited, where the whole poll was thrown out.

In reaching a decision in this case we are influenced to a great extent by the authority of several adjudicated cases arising under the act of 1899 relating, inter alia, to the computation of several election returns by the court of common pleas. This act provides as follows:

"And in case the returns of any election district shall be missing when the returns are presented, or in case of complaint of a qualified elector under oath, charging palpable fraud or mistake, and particularly specifying the alleged fraud or mistake, or where fraud or

mistake is apparent on the return, the court shall examine the return, and if in the judgment of the court it shall be necessary to a just return, said court shall issue summary process against the election officers and overseers, if any, of the election district complained of, to bring them forthwith into court, with all election papers in their possession; and if palpable mistake or fraud shall be discovered, it shall, upon such hearing as may be deemed necessary to enlighten the court, be corrected by the court, and so certified; but all allegations of palpable fraud or mistake shall be decided by the said court within three days after the day the returns are brought into court for computation; and the said inquiry shall be directed only to palpable fraud or mistake, and shall not be deemed a judicial adjudication to conclude any contest now or hereafter to be provided by law."

The practice under the act of 1899 is reasonably well settled.

(1), There must be a complaint under oath, particularly specifying the nature of the fraud or mistake; (2), in case process is issued and a hearing is had the allegations must be proven by proper evidence; (3), if necessary to a correct return the ballot box may be opened and the vote recounted; (4), only "palpable" fraud or mistake can be considered; (5), the investigation cannot be made a substitute for a contested election.

These powers granted by the legislature to the courts of common pleas relate only to the computation of general election returns; but there is no such grant of authority in the Primary Act of 1906; nor can we by judicial construction apply the guarded powers entrusted to us by the act of 1899 to the primary election returns.

We find an analogous condition as to election returns from boroughs and townships. These returns are made to the office of the clerk of the quarter sessions. We have been asked many times to correct "palpable fraud or mistakes" apparent on the face of some of these returns, and to open ballot boxes; but we have held invariably that we have no jurisdiction and that the act of 1899 does not apply to such returns.

We state finally that the supervision of election returns by the courts of common pleas is regulated entirely by statute. Except as indicated in this opinion the main relief for a complainant in connection with nominating returns under the primary act is by a contested

election proceeding, especially if the relief sought, as in this case, means the throwing out of the whole vote of an election district.

Being of the opinion that the appellant has had all the relief that he is entitled to, and there being no complaint as to the manner in which the county commissioners recounted the vote, we make the following order:

Now, July 3, 1909, the appeal in this case is dismissed at the cost of the appellant.

The trust-fund doctrine, requiring one paying for corporate stock in property to show that the property was actually worth the value of the stock, is held, in *Iowa Drug Co. vs. Souers* (Iowa) 117 N.W. 300, 19 L.R.A. (N.S.) to have no application as between the corporation itself and the stockholder who has received his stock in exchange for property surrendered at an agreed valuation.

That an officer of a corporation may be liable for maliciously inducing it to break its contract with its employee and discharge him from his employment is declared in *McGurk vs. Cornenwett*, 199 Mass. 457, 85 N. E. 576, 19 L.R.A. (N.S.) 561.

The liability of a railroad company to an infant who comes upon its premises without invitation, and who is injured there while playing, without its knowledge, with a turntable is denied in *Wheeling & L. E. R. Co. vs. Harvey*, 77 Ohio St. 235, 122 Am. St. Rep. 503, 83 N. E. 66, 19 L.R.A. (N.S.) 1136.

A railroad company is held, in *Thompson vs. Baltimore & O. R. Co.*, 218 Pa. 444, 120 Am. St. Rep. 897, 67 Atl. 768, 19 L.R.A. (N.S.) 1162, to owe no duty to a trespassing child to lock or guard its turntables although such machines are calculated to allure children to them for amusement. With these cases is an elaborate note on the subject of attractive nuisance.

In the Orphans' Court of Lackawanna County.

No. 601 — Year 1907.

Appeal from Register.

In Re: The Estate of Mary Lynn, deceased.

Where it is alleged there is a later will than the one probated, the proponent of the later will should appeal to the Orphans' Court from the decision of the Register probating the former will; and if on the hearing *prima facie* proof is made of the later will, the court will open the decree of probate and direct the proponent of the later will to produce it before the Register and make proof of its execution and validity in the usual manner.

For appellant, Mr. A. A. Chase.

For appellee, Mr. C. P. O'Malley.

Opinion by Sando, P. J. May 17, 1909.

This proceeding is an appeal by Mary Shovelin from the decision of the register admitting to probate, on October 31st, 1907, a paper writing bearing date the 26th day of June, 1903, alleged to be the last will and testament of Mary Lynn, deceased; the appellant, alleging that it is revoked by a subsequent will made on the 4th day of August, 1904, and praying that the decree of probate be opened and that she be permitted to offer for probate the alleged last will and testament of the decedent.

The appeal puts at issue but one question and that relates exclusively to the will which has been admitted to probate, viz: was it the testatrix's last will? The appellant contends it is not, and to establish her contention, she produces a paper executed fourteen months subsequent to the date of the paper probated.

This paper is here in this proceeding simply as a matter of evidence. The paper has never been before the register; it has never been the subject of a judicial decree, and is not before us now except as evidence in connection with the question raised by this appeal, now to be determined. To make effective this appeal, all that is now required by the appellant is to prove by two witnesses the execution of the paper produced by the appellant. It bears a later date; the characteristic qualities of the paper are apparent; by its terms it is a testamentary disposition of property; declares that it is the last will and testament of the decedent; bears upon its face the statements that it revokes "all former wills and testaments by me at any time here-

tofore made" and that the decedent had "hereunto subscribed my hand", by making her mark.

In Carson's Appeal, 59 Pa., 501, Mr. Justice Williams uses this language "the execution of a will, or other testamentary writing, consists in the act of signing it, in the mode prescribed by the statute."

The Act of January 27, 1884, P. L. 16, makes all wills valid "to which the testator hath made his mark, or cross *** provided the other requisites, under existing laws, are complied with."

Where it is alleged there is a later will than the one probated, the proponents of the later will must 'appeal to the Orphans' Court from the decision of the register probating the former will; and if on the hearing *prima facie* proof is made of the later will, the court will open the decree of probate and direct the proponent of the later will to produce it before the register and make proof of its execution and validity in the usual manner. *Lappe's Estate*, 35 Pitts. L.J., 157.

The execution of the paper and its contents, and the identity of the paper having been shown by the testimony of the three witnesses, the appellant has established a *prima facie* case and the decree of probate of the paper dated June 26th, 1903, must be opened.

Now, May 17th, 1909, hearing having been had and testimony taken in the matter of the appeal of Mary Shovelin from the probate by the register of a certain paper writing, dated the 26th day of June, 1903, purporting to be the last will and testament of Mary Lynn, late of the Borough of Archbald, in the County of Lackawanna, deceased, it is ordered, adjudged and decreed, that the decree of the register of wills of Lackawanna County admitting to probate a certain will of the decedent, dated the 26th day of June, 1903, be opened, and that Mary Shovelin, the appellant, produce before the Register of Wills in and for the County of Lackawanna a paper writing claimed to be the last will and testament of Mary Lynn, deceased, dated August 4th, 1904, and proceed to make proof thereof in the usual manner.

One heir of a mortgagor is held, in *Jackson vs. Baird*, 148 N.C. 29, 61 S. E. 632, 19 L.R.A. (N.S.) 591, to have the right to secure title through the foreclosure sale to the exclusion of his coheirs.

In the Court of Common Pleas of Lackawanna County.

No. 1028 September Term, 1908.

Rule to Open Judgment.

Nellie Seamans vs. James S. Porteus.

*Promissory Note Not Under Seal—Statute of Limitations—How
Issue Framed.*

Where A gives B an unsealed promissory note, dated March 10, 1897, and, by leave of Court, a judgment is entered against A July 23, 1908, on a warrant of attorney contained in the note, and there is nothing in the record to show that A did anything to toll the effect of the statute of limitations except the mere allegation of B that A "at various times within the last six years promised to pay the amount of the note and has in other ways recognized and admitted his obligation to pay it", the judgment may be properly opened and A, the defendant, be permitted to plead the statute of limitations.

Mr. Roe, for Plaintiff. Mr. Zimmerman, for Defendant.

E. C. Newcomb, Judge. June 28, 1909.

This judgment is founded on a warrant of attorney in defendant's promissory note for \$200, dated March 10, 1897, at one year. It was regularly entered by leave of court July 23, 1908, more than ten years after maturity of the note which was not under seal. Defendant moves to open the judgment to let in the plea of the statute of limitations.

Prima facie the bar of the statute has intervened. Had suit on the note been begun by writ the plea would have been available as a legitimate defense. No good reason occurs to me why the mere election of the plaintiff to enter judgment on the warrant should in itself operate to deprive defendant of that right. If it appeared that by his own act the bar of the statute had been tolled, the relief asked for would be properly refused. But it does not so appear on the papers, and no depositions have been submitted. In the petition for the rule it is averred that no promise to pay has been made on defendant's part, nor demand for payment on that of plaintiff since the note became due. If it be assumed that it was for him to say anything on that subject in his petition, that was all he could say in stating a negative. By her answer the plaintiff alleges "that defendant at various times within the last six years has promised to pay the amount of the note and has in other ways recognized and admitted his obligation to pay it." This is not all the plaintiff could say in the affirmative of the question. It amounts only to a very general conclusion and as such is believed to be insufficient to overcome the *prima facie* of defendant's case. The rule is made absolute, and the judgment opened. The issue to be made up of the note to stand as plaintiff's declaration, to which the defendant's plea shall be the statute of limitations.

In the Court of Common Pleas of Lackawanna County.

No. 618 May Term, 1904.

MARY ECKERT VS. F. GUSTAVE KRUGERMAN.

*Taxes—Lien of—Sheriff's Schedule of Distribution of Proceeds of
Sale of Real Estate.*

When exceptions to the Sheriff's schedule of distribution of the proceeds of the sale of real estate relating to the item of taxes are filed in due time, and it is shown that the claim for such taxes was not filed in the Court of Common Pleas "on or before the last day of the third calendar year after that on which such taxes are first payable, the claim is wholly lost", and exceptions will be sustained

Effect of the Amendment of May 1st, 1907, P. L. 130.

MR. WILCOX, For Plaintiff.

MR. ———, For Defendant.

Opinion by EDWARDS, P. J., June 28th, 1909.

The sheriff's distribution of the fund arising out of the sale of real estate in this case was made to the court under the provisions of the act of June 4, 1901, P. L. 357. Exceptions to the schedule of distribution were filed in proper time and they are now before us for consideration. The exceptions relate or 'v to the item of taxes, and there is no dispute as to the facts.

Among the taxes deducted out of the fund according to the schedule are the following:

City and School tax for 1903,	\$ 60.28
City and School tax for 1904,	115.92
City tax for 1906,	50.09
School tax for 1906,	62.96

There are claims for other taxes for other years which are not questioned. Are the taxes enumerated above a lien on the fund in the Sheriff's hands? There can be no question as to the taxes for 1903 and 1904. These taxes are not a lien on the fund, because they were not filed in the court of common pleas within the time provided by law. As to the taxes for 1906 we hold otherwise.

The act of June 4, 1901, Sec. 10, P. L. 1901, provides that if a claim for taxes is not filed in said court on or before the last day of the second calendar year after that in which the taxes are first paya-

ble, the claim is wholly lost; but, section 10 of the act was amended in 1907, P. L. 130, in one particular, viz., the time was extended one year, so that the act now reads the *third* calendar year, instead of the *second*. This amendment undoubtedly saves the taxes of 1906. It makes no difference that these taxes were payable before the amendment was passed. The amendment relates only to the remedy or procedure for the collection of taxes and it operates on all taxes unpaid at the time of its adoption. We therefore overrule the exception as to the taxes of 1906 and we sustain it as to the taxes of 1903 and 1904.

It is ordered that the Sheriff's schedule of distribution be modified so that the sum of \$176.20 be deducted from the item of "taxes" and paid to the proper lien creditor.

A fire burning an automobile is held, in *Preston vs. Ætna Ins. Co.* 193 N. Y. 142, 85 N. E. 1006, 19 L.R.A. (N.S.) 133, to originate within the vehicle, within the meaning of an exception of fires so originating in a policy of insurance on it, where, in consequence of the machine's running into a ditch, gasoline leaks from the tank, and the vapor penetrates the lamp forming the headlight, and explodes, causing the fire.

An action is held, in *Carter vs. West Jersey & Seashore R. Co.* (N. J. Err. & App.) 71 Atl. 253, 19 L.R.A. (N.S.) 128, to be maintainable, under a statute permitting the administrator of the mother to recover for the benefit of the children the damages occasioned by the deprivation of the expectation of pecuniary advantage which would have resulted by a continuation of the mother's life, where the mother, who has performed ordinary household duties, including such care of the children as a mother usually takes, has lost her life through the wrongful act of another, notwithstanding the children have been supported in a home maintained with the earnings of the father.

The term "residence", used by the Louisiana Constitution in fixing the qualification of voters, is held, in *Estopinal vs. Michel*, 121 La. 879, 46 So. 907, 19 L.R.A. (N.S.) 759, not to mean domicil.

In the Court of Common Pleas of Lackawanna County.

No. 574 September Term, 1908.

Exceptions to Auditor's Report.

Thomas Murray vs. John J. Murray, et. al.

Common Law Partition Proceedings—Ascertainment of Purparts—

Duty and Powers of Auditor.

Where several parties in interest in a common law partition proceeding agree in writing that partition may be made, that formal appraisement may be waived, that the property could not be divided, and that a certain fixed sum of money should be deemed the appraised value; and, upon a rule to accept or reject, one of the parties in interest accepting, and an order is made awarding the property to her, an auditor appointed to distribute the money among those entitled to it has no authority to make any distribution unless the several purports are first definitely ascertained and set forth by a judgment of the Court.

It is no part of the duty and it is not in the power of the auditor in such a case to presuppose or to conjecture what the various purparts are, and his attempt to do so is without any warrant of law.

The action of the auditor in such a case in so attempting to ascertain the distributive shares will be vacated.

Messrs. Vosburg and Dawson, for Plaintiff.

Mr. J. J. Powell, for Defendant.

Opinion by Newcomb, A. L. J. April 26, 1909.

Apparently there is some merit in certain of these exceptions. But the case is in no shape for satisfactory disposition of them. It is a common law proceeding for partition. After all parties were in court they agreed by paper filed that judgment *quod partitio* might be entered. The agreement included a waiver of formal appraisement, a stipulation that the property could not be divided, etc., and that \$2,000 should be deemed the appraised value. Thereupon followed a rule to accept or reject, an acceptance by one of the parties at \$300 above the appraisement and an order awarding the property to her. This was October 26th, 1908. The money was made payable within thirty days from that date. The next step was November 30th, 1908, when at the purchaser's instance an auditor was appointed "to distribute the money to and among those entitled." It is his distribution of the fund in pursuance of that authority that is now questioned.

It is to be noted that no judgment has ever been entered. In itself that fact might not be an obstacle in the way of distribution,

provided there were any other equivalent means of ascertaining from the record what the several purparts are. They were not determined by the agreement, for that is silent on the subject. They were not determined by a declaration to which the agreement may be assumed to refer, for no declaration was ever filed. The record is, therefore, silent as to the extent and quantity of the respective interests, except as it may be conjectured from the auditor's schedule of distribution. But it was no part of his functions to determine that question. And even though he had affirmatively done so his finding could not supply the defect in the record. His appointment presupposed the several shares to have been theretofore fixed by judgment of the court. In the absence of such adjudication the appointment was premature. There is as yet no legal basis for distribution, and any disposition we might make of these exceptions would leave the result entirely uncertain. Whether the report be confirmed as it is, or modified as contended for by the exceptant, there would be no means of saying by the record that the distributive awards are right or wrong. To assume that the auditor satisfied himself in some way what were the proportionate shares of the parties would, it is true, be a very simple expedient in such case; but unfortunately it is open to the objection of being unwarranted in law.

The auditor's appointment and all proceedings in pursuance thereof are vacated.

A single transaction on an account which has been dormant less than the statutory period, consisting of the debit of a small item and the credit of the amount necessary to cancel it a short time afterwards, is held, in *Rogers vs. Davis*, 103 Me. 405, 69 Atl. 618, 19 L. R. A. (N.S.) 126, to be sufficient to bring the account within the operation of a statute providing that the cause of action in mutual accounts shall be deemed to accrue at the time of the last item proved in such account.

That an assignment of a land contract must be evidenced by writing where a writing is necessary to transfer an interest in real estate is declared in *Flinner vs. McVay*, 37 Mont. 306, 96 Pac. 340, 19 L.R.A. (N.S.) 879.

In the Court of Common Pleas of Lackawanna County.

No. 894 March Term, 1907.

Scire Facias to Revive Judgment.

*Martin H. McDonough, to the use of Bridget McDonough
vs. Timothy Lydon.*

Scire Facias—Rule to Quash—Regularity of Writ.

Where a judgment is entered against A, a defendant, on February 20th, 1902, and a Writ of Scire Facias to revive and continue the lien of the judgment is issued March 12th, 1907, and the Sheriff returns the writ as served on a terre tenant, and "nihil habet" as to another person also as to the original defendant, who, the Sheriff was informed, was dead, a Rule to quash the writ on the ground of irregularity and of some alleged facts which are outside of the record, will be quashed.

In such proceedings the Court will not concern itself with statements outside of the record, with the time of the original defendant's death, with the effect of a judgment against the terre tenant on the Scire Facias, or with the particular property which may be, or may not be, subject to execution on such judgment.

The praecipe for Scire Facias in this instance need not contain an affidavit setting forth who are the owners of the land sought to be charged.

The Act of July 9th, 1901, P. L. 614, and its supplement of April 23, 1903, P. L. 261, relating to the service of process, discussed and explained.

Messrs. Martin and Powell, for Plaintiff.

Messrs. Willard, Warren & Knapp, for Defendant.

Opinion by Edwards, P. J., May 3rd, 1909.

Counsel for the defense in this case raise several questions which cannot be considered on a motion to quash the scire facias. It appears from the record that a judgment was entered against Timothy Lydon on February 20, 1902. More than five years thereafter, viz., on March 12, 1907, a scire facias to revive said judgment issued against Timothy Lydon with notice to John Lydon and John Lydon, Jr. To this writ the sheriff returned a service on John Lydon, terre tenant, nihil habet as to John Lydon, Jr., and nihil habet as to Timothy Lydon, who, as the sheriff was informed, was dead. This is the scire facias we are asked to quash. In the petition on which the rule was granted it is averred that Timothy Lydon died March 13, 1902; but this is outside of the record and we are not now concerned with the time of defendant's death, nor with the effect of a judgment against the terre tenant on the scire facias, nor with the particular property which may, or may not, be taken in execution.

on such a judgment. These questions may be raised in some future proceedings. The only matter before us now is the regularity of the writ of scire facias.

We find only one suggestion advanced which might affect the regularity of the writ in this case, and that is that the plaintiff failed to file with the praecipe for the scire facias an affidavit setting forth who are the owners of the land intended to be charged, it being claimed that the purpose in instituting the present proceedings is to charge the land of a devisee of Timothy Lydon the defendant in the original judgment. This contention, in our judgment, is entirely without merit. The tenth clause of section one of the act of 1901, relating to the service of process, as amended by the act of 1903, P. L. 261, does not apply to a scire facias to revive and continue the lien of a judgment. The affidavit required by the clause referred to is demandable in the following cases only: (1) In ejectment; (2) in a summons to recover upon a ground-rent deed, or to recover any sum charged upon real property by will or deed; (3) in any writ of scire facia sur mortgage, and (4) in any writ to charge particular land with the payment of a particular debt running with the land. Defendant's counsel claim that the case at bar is within class four. This claim is untenable. The fourth sub-division is a blanket clause inserted in the act to cover all other possible ways in which particular lands are charged with particular debts "running with the land", and is an amplification of sub-division two. Land may be chargeable with ground-rent specified in the deed; or, land may be devised burdened with the payment of a legacy; or, land may be deeded subject to dower or some other charge. But, there are other ways in which debts, or the payment of certain sums of money, may be charged against particular lands. To meet all the possible methods, other than those specifically enumerated in the act, by which an interest in land may be vested in some other person subject to the payment of a debt, or a sum of money which is to "run with the land", the blanket clause referred to was made a part of the act of assembly.

We have examined some twenty or more cases wherein the tenth clause of section one of the act of 1901 is considered, and in none of them has the question now before us been raised. This fact, of course, is not conclusive; yet is somewhat persuasive as to the weakness of defendant's position.

It is proper to note that we have not considered the alias scire facias issued after the present rule was granted.

The rule to quash the scire facias is discharged.

In the Court of Common Pleas of Lackawanna County.

No. 658 January Term, 1909.

Rules to Bring Ejectment.

William Utley vs. J. Abner Cobb.

Where A and B, under the Act of March 8, 1899, P. L. 10, and the amending Act of April 16, 1903, P. L. 252, begin counter proceedings in ejectment, each seeking to compel the other to bring his action for the land in controversy, the answer of each denying both title and possession in the other, and depositions are filed by both sides, and it appears that color of title, or apparent possession, is in A, the rule will be made absolute as to B and he will be compelled to bring his action sec. reg.

The jurisdiction of Court, under the Act of 1889 in such case will not be ousted unless there is something more than mere denial of possession on one hand or the assertion of it on the other.

The actions of B may be taken as circumstantial evidence against his claim of possession.

Messrs. Vosburg and Dawson, for plaintiff.

Mr. L. P. Wedeman, for defendant.

Opinion by Newcomb, A. L. J. June 28, 1909.

Under the act of 8th March, 1889, P. L. 10, as amended by that of 16th April, 1903, P. L. 212, counter proceedings were taken by each party to compel the other to bring his action for the land in controversy. In each instance the material averments of the petition are traversed by answer denying both the title and possession of the adversary. Depositions have been filed on both sides. Thus the parties have voluntarily submitted the disputed question of possession to be determined by the court.

If on their mutual showing the land appeared to be the subject of a mere scrambling possession it might present a case for an issue to be framed and tried under the intermediate act of 10th June, 1893, P. L. 415: *Light and Heat Co. vs. Rentz*, 13 Pa. D. R. 609. But that is not the character of the dispute. There must be something more than the mere naked denial of possession on the one hand or assertion on the other in order to oust the jurisdiction under the act of 1889. It ought, at least, to appear that the possession is not only disputed, but disputable to make it a case of scrambling possession.

In this instance Cobb claims both by patent from the Commonwealth and by a tax title; Utley by parol gift from his grandfather's

heirs at law, before the sale for taxes, which he claims to have extinguished by redemption.

To say the least, Cobb has color of title. On the subject of the apparent possession the issue is with him. A few significant facts are decisive against Utley on that question.

In 1906 he brought ejectment against Cobb for the property ; eventually the cause was put at issue and on the list for trial at the November term last year ; November 6, 1908, on the eve of trial, the case was voluntarily discontinued without notice to Cobb or leave of court. In the meantime at the suit of Cobb, by bill filed in February, 1908, Utley had been restrained from trespassing and cutting timber on the premises. The preliminary injunction was afterwards continued until further order by agreement of parties ; in that status the possession has remained ever since, and Utley is careful now to disclaim any entry on the land since the injunction went out.

Under these circumstances it would be trifling with both the law and the facts to countenance his alleged possession either actual or constructive. Manifestly the actual and peaceable possession is in Cobb.

It follows that this rule should be made absolute. It is so ordered and William Utley, the respondent therein, is directed to bring his action of ejectment *sec. leg.* The counter rule taken on behalf of Utley is discharged.

That the legal existence of a court organized and created under color of law cannot be questioned in habeas corpus sued out by a person convicted and sentenced to imprisonment in proceedings had before it is declared in *State ex rel. Bales vs. Bailey*, 106 Minn. 138, 118 N. W. 676, 19 L.R.A. (N.S.) 775.

A sale of the good will of a partnership business in connection with a sale of the business is held, in *Southworth vs. Davison*, 106 Minn. 119, 118 N. W. 363, 10 L.R.A. (N.S.) 769, to bind the members thereof individually as well as copartners.

In the Orphans' Court of Lackawanna County.

No. 543, Year 1905.

Sur Amended Petition for Accounting and Demurrer.

In Re: Estate of Sydenham W. Keller, Deceased.

*Accounting—Executors and Administrators—Exemption
From Filing Account.*

The testator gave his entire estate to his wife for life and after her death to his son, and appointed the widow and son executors, with a direction that they should not be required to file any account.

The representative of the widow after the death of the son, cannot in the absence of fraud, or any allegation thereof, compel the representative of the son to file an account on the ground that the son had converted the assets, and had not paid the income to his mother during her life.

Mr. A. A. Vosburg and Mr. B. F. Tinkham, for petitioner.

Mr. J. G. Sanderson and Hon. John P. Kelly, contra.

Opinion by Sando, P. J. June 6, 1908.

The testator died August 10, 1905, leaving to survive him a widow, Louisa Keller, and one son, Horatio S. Keller. By his will he provided as follows, viz:

"I give, bequeath, and devise of my estate, real and personal and mixed, and wheresoever the same may be situated at the time of my death, unto my wife Louisa Keller, during her and from and after her death to my son Horatio Seymour Keller, to his heirs and assigns forever." After naming his wife and son "as the Executors" he further provided that "no inventory nor appraisement nor account of my estate shall be filed by them."

Letters testamentary on the estate were granted to the widow and son. The son, Horatio S. Keller, died May 12, 1907, intestate, and the widow, Louisa Keller, died May 21, 1907, testate. No administration d. b. n., has been raised in the original estate.

The respondents in this matter before us are now asked to file an account, as the personal representatives of H. S. Keller, deceased of the administration of their decedent of the estate of the testator so far as the same had been administered by H. S. Keller in his lifetime.

To the amended petition the respondents have filed a demurrer. The demurrer filed is more than a mere denial of the petitioner's

right to demand an account, and is based upon matters apparent on the face of the petition.

The petition not only fails to allege that an inventory and appraisal have been filed, but specifically states that neither has been filed.

The Act of March 15, 1832, P. L. 139 section 15, provides first, for the filing of an inventory within thirty days from the grant of letters, and secondly for the filing of an account within one year. It prescribes the order in which the steps towards the settlement of an estate of a decedent should be taken.

The obvious purpose for which an inventory is required to be filed within thirty days after the grant of letters, is that parties in interest may be informed, while knowledge of the subject is recent, of what the estate with which the executor or administrator is chargeable consists, and thus be enabled to see, when the time for accounting arrives, that no part of it has been lost through his act or default: *Fleming's Estate*, 10 Dist. Rep. 259.

A petition for a citation on an administrator to be file an account is defective and demurrable which fails to allege an inventory or appraisalment was filed: *Mead's Estate*, 4 Dist. Rep. 750.

The petition nowhere avers that property of the testator ever came into possession of the respondents. There is no allegation that any assets are now in the possession of the respondents, and no averment of assets belonging to the estate of Louisa Keller, deceased, in their possession.

A petition to compel the filing of an account by the administrators of the deceased executor, should specifically aver the possession of assets, belonging to the estate of the testator, by the respondent.

To entitle a petitioner to an accounting from the executor of a deceased executor the petition must aver that there are assets of the estate in the hands of the second executor: 18 "Cyc." 1133.

The petition avers that Horatio S. Keller as an executor of the estate of the testator received moneyes of the estate which he should have paid to Louisa Keller. It nowhere avers that the respondents have any of that money. Without that allegation, the respondents cannot be compelled to account for something not alleged to be in their hands.

The representatives of a deceased executor or administrator are compellable, at the discretion of the court, to bring in an inventory, as well as final account, on behalf of a delinquent testator or intestate: Schouler on Executors, Sec. 232. But lapse of time may justify a refusal to order an account of administration; especially in connection with other circumstances, such as the death of all parties cognizant of the transactions.

A waiver may also be implied, or at least presumed, from a failure to act or to insist seasonably on a right, for it is required of every one to take advantage of his rights at a proper time. Was there any positive duty imposed upon Louisa Keller in her lifetime to act? With these questions answered in the affirmative a strong foundation has been laid upon which to build a waiver of right by failure to act.

The presumption of law which the petition does not overcome in this case is that Horatio S. Keller fully accounted to Louisa Keller in his lifetime.

The testator left to survive him his widow and his son. In his will he left all his property to his wife with the remainder to his son, and expressly provided that no inventory or account need be filed. He left no other legatee or devisee or any one in any way interested in his estate. It is not alleged that the widow was ever dissatisfied with the management of the estate by the son; that she ever asked for an account; or, that she ever believed or stated to any one that her son had failed in any way to give her all that was her due.

The petition shows on its face that for nearly two years the estate was managed by her son. There is no allegation of non-payment or complaint on the part of Louisa Keller. It is therefore to be presumed that the money must have passed into the possession of the widow. The law does not presume fraud or mismanagement. The assets of the testator must therefore in this case be presumed to have passed into the possession of Louisa Keller in her lifetime.

As the petition now stands it must be presumed that by reason of the interest in the estate and relationship between Horatio S. Keller and Louise Keller, that Louisa Keller received all that was due her.

The petition is defective in that it fails to aver the filing of an inventory and appraisement; that any assets of the estate of the testator ever came into possession of the respondent; that any property of the testator belonging to the estate of Louisa Keller, ever came into the possession of the respondents; that it fails to set forth facts sufficient, if true, to overcome the presumption of law, that Horatio S. Keller is presumed to have paid unto Louisa Keller all that was due her from him as executor of the estate of the testator; and finally that taken in connection with the record, the petition fails to establish a prima facie right to an accounting.

Now, June 6, 1908, demurrer sustained.

In the Court of Common Pleas of Lackawanna County.

No. 791 March Term, 1907.

Rule For New Trial

JOHN PASTORIK VS. MICHAEL REPASH.

Rule for Judgment Non Obstante Veredicto.

Ejectment—Measure and Manner of Proof Required of Defendant—Interpretation of Act of May 8th, 1901, P. L. 142.

Where A, a husband, conveys a property to B, his wife, who subsequently conveys it to C, and an Action in Ejectment in which D, the Plaintiff and C, the Defendant claim title from the same source is begun, the fact that a jury has found that A was insane when he made the deed to B need not be set forth in Plaintiff's statement as a possible basis of attacking C's title.

In such a case, Plaintiff is not required under Pleading Act of May 8th, 1901, to set forth his intention to attack A's conveyance to B,—the purpose of the Act referring to some affirmative claim of title and not to manner of pleading.

Messrs. Brennan & Donahoe, for Plaintiff.

Messrs. Maxey & Gardner, for Defendants.

Opinion by Edwards, P. J. May 3rd, 1909.

Each party to this case claims under a common source of title. John Nozdon acquired the land in dispute in 1891. In February, 1896, he made a deed for the property to his wife. The title of the defendant depends on the validity of this deed from John Nozdon to his wife, Phanis Nozdon. Plaintiff, whose title comes from the heirs of John Nozdon, attacked the deed from Nozdon to his wife on the ground of Nozdon's insanity or mental incapacity. This question

was submitted to the jury, who found on abundantly sufficient evidence that Nozdon was insane when he made the deed to his wife in 1896. Nozdon's want of capacity was the only question of fact involved in the case, and there is no complaint as to the manner in which this question was submitted to the jury.

Defendant's complaint and the basis of the two rules before us relates solely to a matter of pleading. Under section two of the act of 1901, P. L. 142, plaintiff filed his declaration and an abstract of his title. Defendant filed a plea of "not guilty", an answer, and abstract of title. In defendant's abstract reference is made to the deed of 1896 from Nozdon to his wife. Defendant maintains that in the absence of any suggestion in the pleadings of an intention on the part of the plaintiff to attack the Nozdon deed on the ground of the grantor's mental incapacity no evidence could be received on the trial of any matter not appearing in the pleadings. Defendant's counsel suggests that plaintiff should have filed a replication denying the validity of the Nozdon deed and giving the reason for the denial, or that notice should have been given the defendant before the trial of plaintiff's intention to attack the Nozdon deed.

We do not think the contention of the defendant is sound. The limitation in section two of the act as to the evidence to be received at the trial evidently refers to some affirmative claim of title recited by plaintiff or defendant in the pleadings. For instance, a defendant who in his abstract recites title by sundry conveyances, cannot at the trial offer evidence of title by adverse possession, nor vice versa. The same rule applies to the plaintiff. A claimant, who, in his abstract, relies on a title by devise only, cannot offer evidence of title by deed, or by parol, or by some other means of acquiring title. We cannot find that the exact point before us has been adjudicated. In the case of *Klick vs. Gernert*, 220 Pa., 503, defendant offered in evidence the record of a prior suit in equity claimed to be *res adjudicata* of the matter in dispute, there being no reference to such a defense in the answer. The admission of the record was held to be error because it was outside of the pleadings, although the court below was affirmed for the reason that the defendant having the right to amend, it would be useless to try the case over again, the decree in the equity case being conclusive of the controversy between the

parties. This case is not authority on the point now before us. The record of the equity proceedings was an affirmatively essential element of Gernert's defense and he should have set it up in his answer,

Section two of the act of 1901, already referred to, has no provision for replication, or for notice of a contemplated attack on any deed, or devise, or any other link in the chain of either party's title. Each party must come into court prepared to meet any attack which might be made by the other on any conveyance recited in the pleadings. This has always been the law. There are many cases where a will or a deed offered in evidence by a claimant in an ejectment suit has been attacked on the ground of the mental incapacity of the devisor or grantor. A deed relied on by either party might be attacked by the other for any one of several reasons. The deed might be a forgery; or, it might be invalid for the want of due execution; or, there might be some defect in the acknowledgment of the deed; or, the grantor's wife has not joined in the conveyance; or, the grantor might not be of legal age; or, he might have been insane when the deed was signed. Any link in the chain of title of either party is open to attack without notice. Each party is presumed to have knowledge of the essential requisites of a deed, and he must be prepared to maintain, if necessary, that the grantor in the deed relied on was of sound mind and capable of making a contract and that the deed is valid in all other respects if it should be attacked in the course of the trial.

Now, May 3, 1909, the rules for a new trial and for judgment to be entered on the verdict in favor of the plaintiff.

One engaged in discharging coal from vessels, who provides suitable apparatus for the work, is held, in *Loud vs. Lane*, 103 Me. 309, 69 Atl. 270 19 L.R.A. (N.S.) 680, not to be responsible to an employee for the manner in which it is set up by the men employed in doing the work; and therefore he is held not to be liable for injury to an employee caused by the fall of the apparatus because it was fastened to a decayed cleat on the mast of the vessel, without stays to prevent its falling if the fastenings should give away.

In the Court of Common Pleas of Lackawanna County.

No. 439 November Term, 1907.

Standard Brewing Company vs. Giuseppe Saracino.

Exceptions to Report of Referee.

Judgment—Rule to Open—Reformation of Written Instrument.

A executes a judgment note in the sum of five hundred dollars (\$500) "In favor of the parties of the first part", namely, B, a corporation, and C, an individual, with the stipulation for a confession of judgment, so as to secure A's promise to buy a certain amount of ales used in his business from B and all of his wines and liquors from C. It is further agreed that the five hundred dollars (\$500) was to be taken as liquidated damages and that execution might issue by either B or C upon breach of agreement.

B issues execution on an alleged breach; on rule judgment is opened, issue framed and case is referred. The referee, in the absence of any actual damages holds that on breach of promise to buy the products of B, B alone could recover one-half of the amount confessed. The judgment of the referee will be set aside as an attempt to reform a written instrument without the consent of either party thereto.

The defendant should have asked in this case for a rule to strike-off judgment and not a rule to open judgment.

Mr. Ralph Rymer, for Plaintiff.

Opinion by Newcomb, E. C. June 28, 1909.

At defendant's instance judgment on his confession was opened and an issue framed to try the merits. The issue was made up of the writing, containing the confession, to stand as plaintiff's declaration, with a plea of non assumpsit. According to the terms of the paper, judgment in the sum of \$500 was confessed by defendant "in favor of the *parties* of the first part", etc.

They were two in number: The Standard Brewing Company, and P. F. Cusick. It was stipulated in the instrument that the confession was to secure performance of defendant's promise to buy one-half the ales and beers used in his retail liquor business from the Brewing Company, and all of his liquors and wines from Cusick. It was further stipulated that the \$500 "is to be taken as liquidated damages, and execution may issue therefor upon an affidavit being filed by either of the parties of the first part of a breach of this agreement on part of the party of the second part."

It was claimed on the trial that the contract was joint and not several, and therefore the action could not be maintained by the Brewing Company alone. The contention was rejected by the learned referee who held, in the absence of any proof of actual damages, that on breach of the promise to buy the products of the Brewing Company, it alone could recover one-half part of the \$500. Judgment was directed accordingly.

In effect this was a reformation of the written instrument without either allegation or proof to warrant it. The initial mistake was in the form of relief asked for by the defendant. His motion was to open the judgment; it should have been to strike off. On the plain and unequivocal terms of the confession the judgment was irregular for want of proper parties. Without the defendant's consent neither the plaintiff nor the referee can vary the form of the judgment as confessed, with respect to the parties or otherwise. As it now stands the result is very incongruous. For anything we can see to the contrary a like proceeding may at any time be taken by the other party to the writing and thus two judgments had on one confession. In order that the case may be put in proper shape the whole thing should be cut up by the roots.

The exceptions are sustained and the referee's report set aside; thereupon the judgment is stricken off as irregular and void for want of proper parties, without prejudice to their right to proceed on the confession *de novo*.

An attorney traveling over a street railway simply for the purpose of ascertaining whether or not a transfer will be given him at a certain point as required by statute, which information he desires for the benefit of suits already commenced on behalf of clients for the statutory penalty for refusal to give them transfers, is held, in *Bull v. New York City R. Co.* 192 N. Y. 361, 85 N. E. 385, 19 L.R.A. (N.S.) 778, not to be entitled to bring an action for the statutory penalty because of the refusal to give him one, where the statute requires the carrying of passengers desiring to make a continuous trip between certain points for one fare, and imposes a forfeiture to the person aggrieved by refusal to issue the necessary transfer.

In the Court of Common Pleas of Lackawanna County.

No. 564 May Term, 1906.

Edwin S. Williams vs. Rocky Glen Water Company.

Sci. fa. sur Mech. Lien.

Execution—Rule to Stay.

Where a Rule to stay execution is granted on August 22, 1908 and served the same day, and no answer is filed till Sept. 14, 1908, under the Rule of Court the Defendant's petition is to be taken as true, and the Rule may be made absolute.

A special agreement in writing between the parties between the time of granting the Rule and filing an answer may change the status of the parties and the effect of the Rule of the Court.

Mr. S. B. Price, for Plaintiff.

Messrs. Vosburg & Dawson, for Defendant.

Opinion by H. M. Edwards, P. J. June 28, 1909.

It is impossible to dispose of the rule now before us in the present state of the record.

The rule was granted on August 22, 1908, and service of the rule and petition was accepted on the same day. No answer was filed until September 14, 1908. Under this state of facts and according to the rule of court defendant's petition must be taken as true. Were there nothing else in the case we would make the rule absolute.

There is before us, in an informal way, another agreement between the parties to this case, dated August 27, 1908, five days later than the date of the rule. Our recollection is that both parties agreed at the argument that this later agreement should be considered in evidence. The agreement provides, inter alia, a method for the adjustment of the accounts of plaintiff and defendant in the action of assumpsit now pending. If the parties cannot agree amicably on the amount due the plaintiff in that action, the matter is to be referred to an expert accountant. After ascertaining the amount, the annual payments are to be fixed by the counsel, who are authorized to call in a third arbitrator if they cannot agree.

It should be clearly understood that the account to be submitted to the expert accountant does not include the amount due on the mechanic's lien to which the present rule relates. This amount has

been liquidated and is in judgment. But, the agreement of August 27th provides for an extension of five years of the time for the payment of three items, viz.; (1), the balance found to be due in the said action of assumpsit; (2), the amount of the judgment in said mechanic's lien; (3), the amount of a certain mortgage.

We do not know what has been done under the above agreement. Has the accountant been chosen? Has the amount due in the action of assumpsit been ascertained? Have counsel agreed on the annual payments? We have no information as to any of these questions, because no depositions have been taken. It appears to us that parties should proceed at once to carry out the terms of the agreement of August 27th, unless that has already been done.

So as not to prejudice the rights of either party it is ordered that the present rule be continued and the prothonotary place it on the next argument list.

In the Court of Common Pleas of Lackawanna County.

No. 1264 September Term, 1908.

John Games vs. Max Gilder H. Boginsky.

Replevin—Pleadings—Procedure Act of 1887 and

Replevin Act of 1901, P. L. 88.

Where, in an action of replevin, plaintiff sues in accordance with the old common law forms, and not in conformity with the Replevin Act of April 19, 1901, P. L. 88, which requires the declaration to be a concise statement of the demands verified by oath, a demurrer to the plaintiff's pleadings is sustainable.

The Procedure Act of 1887 does not apply to actions of replevin.

Messrs. C. E. Daniels and W. M. Bunnell, for Plaintiff.

Messrs. E. C. Ammerman and George Maxey, for Defendant.

Opinion by H. M. Edwards, P. J. September 13, 1909.

While it has been decided that the procedure act of 1887 does not apply to actions of replevin and that the pleadings in such actions continued according to common law forms; nevertheless, the replevin act of 1901, P. L. 88, applying as it does to all actions of replevin, has modified the forms of pleading and has particularly prescribed how the issue shall be constituted.

The fourth section of the replevin act provides that "the plaintiff in such action shall file a declaration, verified by oath, which shall consist of a concise statement of his demand, setting forth the facts upon which his title to the goods and chattels is based." Judged by this standard the declaration in this case, being according to the old common law form, is of no value whatever. It is not verified by oath; it is not concise and it sets forth no facts.

The demurrer is sustained and the plaintiff is allowed twenty days in which to file a new declaration.

In the Court of Common Pleas of Lackawanna County.

No. 366 January Term, 1908.

Exceptions to Plaintiff's Statement and Abstract of Title.

Bridget Shea Burke vs. Michael J. Swift.

Ejectment—Abstract of Title—Details of Proof.

Where, in an action in ejectment, an amended statement is filed by the plaintiff and the defendant excepts to the statement, inter alia, on the ground that it does not trace title to the Commonwealth, or in default thereof, show possession in the plaintiff and predecessors for thirty years, the exceptions will be dismissed.

Averments of possession are not required by the statute to be specific in all particulars relating to proof.

Mr. James J. O'Malley, for Plaintiff.

Mr. C. A. Battenberg, for Defendant.

Opinion by E. C. Newcomb, A. L. J. June 28, 1909.

The statement under attack is an amendment filed by leave of court January 5th this year. The exceptions are numerous, but the chief objection is that it fails to trace title to the commonwealth, or, in default of that, to show possession in the plaintiff and her predecessors for thirty years. In the analysis of the argument it only comes to this, that the averment of possession is general rather than specific. The criticism seems somewhat hypercritical. The plaintiff isn't bound to disclose the details of her proof. It is enough if the nature and character of her title be so defined that the adversary may know what he is to meet. He is not entitled to know who the witnesses are by whom the plaintiff may seek to prove her case. The amended papers are believed to be sufficient under the statute and the exceptions are overruled.

In the Court of Common Pleas of Lackawanna County.

No. 2 September Term, 1909.

In Equity.

Demurrer to Bill in Equity.

*John E. Roche, Receiver of The New Equitable Building and
Loan Association vs. The Reading Trust Company.*

*First Mortgagee—Assignment of Bond and Mortgage—Demurrer—
Attorney's Commission.*

A, a receiver for a second mortgagee, brings a Bill in Equity to compel B, the first mortgagee, to assign its bond and mortgage to A upon offer of payment of the same in full. B demurs to the Bill on the ground that the offer does not include the attorney's commission and overlooks a Rule of Court requiring a demurrer to be supported by an affidavit. A joins in the demurrer and B waives the omission.

It is immaterial that the mortgagor is a bankrupt as the status of the property is the same, and the Federal Court will have it in its control.

In such a case Court will decree an assignment of the bond and mortgage of the first mortgagee to the receiver on payment of sum due on mortgage, with the attorney's commission.

In arguing the demurrer, the Court will not inquire into the question of the amount of the attorney's commission.

Messrs. Willard, Warren & Knapp, and A. A. Vosburg, for Plaintiff.

Messrs. W. A. Wilcox and W. J. Douglas, for Defendant.

Opinion by H. M. Edwards, P. J. July 3, 1909.

Defendant evidently overlooked equity rule 32, because the demurrer is not supported by affidavit; but as the plaintiff has joined in the demurrer and the case was argued before us on its merits, the defendant has waived the omission.

The defendant has a first mortgage on the property of F. G. Krugerman, and the plaintiff has a second mortgage on the same property. Plaintiff has offered to pay defendant's mortgage in full provided defendant would assign the mortgage (and bond) to the plaintiff. This the defendant has refused to do unless the attorney's commission be paid also. On a demurrer we cannot inquire into the question of the amount of the attorney's commission. There is nothing before us on this point. As to the relief prayed for by the plaintiff he is undoubtedly entitled to it. It makes no difference that the mortgagor is a bankrupt. The status of the property remains the same and the federal court will still have it within its control.

We give judgment in favor of the plaintiff on the demurrer.

Counsel for both parties having agreed to waive the requirements of equity rule 84 as to notice and that a final decree may be entered at once we make the following decree:

This cause came on to be heard on demurrer and joinder therein, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed that the defendant, The Reading Trust Company, assign, set over and transfer to the plaintiff, John E. Roche, Receiver of the New Equitable Building and Loan Association, the liens, judgment and mortgage mentioned in plaintiff's bill of complaint being the same held by the said defendant against the property of F. G. Krugerman, on payment by the plaintiff to the defendant of the sum due on said mortgage or judgment, including attorney's commission of \$500.

Where an oil and gas lease conveys a freehold, it is held, in *People ex rel. Carrell vs. Bell*, 237 Ill. 332, 86 N. E. 593, 19 L.R.A. (N.S.) 746, that it should be assessed for taxation as real estate.

Mere fear or suspicion on the part of the lessor that a lessee intends to sell intoxicating liquor on the leased premises without authority of law is held, in *Harrison vs. Shirley* (Iowa) 117 N. W. 963, 19 L.R.A. (N.S.) 662, not to avoid a bond by which the lessee undertakes to hold the lessor harmless from any expenditure or costs because of the unlawful sale of liquor upon the premises.

Where, under the statute which authorizes cities of the third class to impose a license tax upon "real-estate agents," the council of such a city enacts an ordinance imposing tax upon the business of "real estate," and a real-estate agent thereafter continues to conduct his business within said city without a license, and, in such business, makes a contract to find a buyer of real estate for a compensation, such ordinance is held, in *Manker vs. Tough* (Kan.) 98 Pac. 792, 19 L.R.A. (N.S.) 675, not to render the contract illegal and void.

In the Court of Common Pleas of Lackawanna County.

No. 664 September Term, 1909.

Rule to Open Judgment.

W. F. Davenport, et al., Trustees, etc. vs. Thomas Monie.

*Landlord and Tenant—Ejectment and Dispossession—Action for
Rent Due—Incompatibility of Lessor's Remedies.*

A, a tenant, on April 1, 1908, rents premises from B et al., trustees, for five years, subject to a special proviso for termination on sixty days' notice at option of lessor, on happening of a certain contingency, under which proviso notice to quit was served March 23, 1909, though event under which special proviso was operative did not occur till May 25, 1909. The lease also contained an amicable confession of judgment and ejectment, and warrant of attorney, and on May 31, 1909, demand was made for payment within fifteen days of a certain amount of rent, alleged to be due and in arrear. On June 15, 1909, an action was begun before an Alderman to dispossess defendant for non-payment of rent, the final disposition of this action being uncertain. On June 21, 1909, judgment is entered against the defendant by confession in an amicable action of ejectment and immediately thereafter another judgment in the sum of \$180 for rent for fifteen months, ending July 1, 1909, and on June 24 B et. al. issue fi. fa. to collect rent and hab. fa. to dispossess. The actions and remedies resorted to by B et al. are incompatible and raise a question for the decision of a jury.

Messrs. Leach & Morrow, for Plaintiff.

Opinion by F. C. Newcomb, A. L. J.

September 13, 1909.

June 21, this year, judgment was entered against defendant by confession in an amicable action of ejectment. He was tenant to the trustees of the Archbald Presbyterian church under whom he held a lease for the parsonage. The proceeding was founded on his warrant of attorney contained in the lease. This was dated April 1, 1908, and the demise was for the term of five years, subject to a special provision whereby it could be terminated at the option of the lessor on sixty days' notice in writing to the defendant, in case a permanent minister should in the meantime be employed by the congregation who might desire to occupy the property. The plaintiffs filed a declaration, as part of the papers in the case, in which it was averred that this contingency had happened and that they had exercised the right to determine the tenancy. Coupled with this a breach of

defendant's covenant to pay the rent was also averred. Both averments are seriously controverted by his petition supported by depositions.

The notice to quit on account of the employment of a minister was given March 23rd this year. The minister therein referred to had then been supplying the church as pastor for upwards of a year. While some steps looking to his regular installation had been taken in April, nothing formal enough for the action of the proper authorities was done until May 25th when the Presbytery having jurisdiction in the premises was in special session at Plains. Hence the notice of March 23rd was apparently premature, and so far as appears it was the only notice to quit on that account prior to the entry of judgment.

There was, however, a subsequent notice but of very different character. That was on May 31st. It was a demand for the payment of \$174, rent accrued to that date under the terms of the lease and alleged to be in arrear. The demand was for payment within fifteen days from that date or otherwise to give up possession. This was hardly consistent with the theory that plaintiffs considered the term at an end by reason of the notice of March 23rd, since which sixty days had already elapsed. On the contrary it might well suggest the inference that the purpose of the former notice had been abandoned. That is not all. Such inference was further strengthened by proceedings begun June 14th before an alderman of this city to dispossess defendant, for non-payment of rent, under the act of 3rd April, 1830; upon the allegation that there were no goods on the premises out of which the rent could be collected. Whether that case went to judgment for defendant on the return day, June 18th, or was then voluntarily discontinued by the plaintiffs is now disputed. But what the outcome was is quite immaterial to the present controversy and we shall not undertake to settle that dispute. The only thing in that regard at all pertinent is the fact that up to the eve of the present judgment the plaintiffs treated the defendant as rightfully in possession under the lease; while on the other hand they entered a judgment of ouster which presupposed the tenancy had ended in May. Nor is that all. Along with this judgment they entered another to the next number which necessarily implied his

right of possession to the end of the then current month of June. This was a judgment by confession in the same lease for the rent reserved. That was \$12 per month payable in advance. Claiming that it was wholly unpaid the plaintiffs entered judgment for \$180, being the rent for the fifteen months ending July 1st. And on June 24th they issued a *fi. fa.* to collect that amount. At the same time on the present judgment they issued a *hab. fa.* to dispossess the defendant. Thus, they had two proceedings, one in affirmance and the other in denial of the tenancy at one and the same time. One position or the other is untenable. If plaintiffs were entitled to collect the rent to the end of June, the defendant was at least entitled to the undisturbed possession till that time. It is not for us to elect by which action they shall stand or fall. All we can say is that the two are incompatible, and that *prima facie* the judgment in ejectment is so inconsistent with the other facts in the case that it raises a question which may be one of fact for a jury.

So far as concerns the allegations of default in the payment of rent it is enough to say that it nowhere appears that the lessors ever gave notice of their election to forfeit the term on that ground. If it be granted that they might do that under the provisions of the lease then it would be essential that unequivocal action be taken and notice thereof be given to the tenant. Their case as it now stands derives no support from that source. While enough appears to warrant its submission to a jury we venture to suggest that the parties could with propriety, and probably to their ultimate satisfaction on both sides, submit the dispute to a tribunal of their own selection from those connected with the government of their church.

The rule to show cause is made absolute and the judgment opened. Let a formal issue be submitted by counsel.

A grant to one, his heirs and assigns, habendum to him during the term of his natural life, remainder to such of his children as shall arrive at the age of twenty-one years, their heirs and assigns, is held, in *Simonds vs. Simonds*, 199 Mass. 552, 85 N. E. 860, 19 I.R.A. (N.S.) 686, to create a fee in the first taker to hold for his use during life and then for the use of such of his children as shall attain majority, whether they do so before or after his death.

In the Court of Common Pleas of Lackawanna County.

No. 718 March Term, 1909.

Mandamus.

Commonwealth of Pennsylvania Ex Rel.

*Charles H. Hall, vs. Charles Graff, Clerk of the Courts of
Lackawanna County.*

Demurrer to Return.

*Borough Election Returns—Where Returnable—Mandamus—Clerk of the Quarter
Sessions not a Judicial Officer to compute Votes.*

In an election for a Borough Auditor, A, the relator, and B being candidates for this office, election returns are made to the Clerk of the Quarter Sessions, the Respondent, and show that in a certain District the open return-sheet gives A 45 and B 175 votes, the tally-sheet, however, giving A 49 votes. Returns made, the Clerk proceeds to tabulate the vote in his docket and used the tally-sheets which, in the general count, gave A a majority of three votes; but, on the following day, the election board of the district present affidavits setting forth that the tally-sheets were incorrect and that A received only 45 votes where-upon the Clerk changes the figures on his docket so as to conform to the figures in the affidavit of election officers, which changes result in B's election.

In such a case returns are properly made to the Clerk of Quarter Sessions and Court will not grant mandamus on Clerk to give certificate of election to A.

Messrs. A. A. Vosburg and R. A. Zimmerman, for relator.

Mr. D. J. Reedy, for respondent.

Opinion by H. M. Edwards, P. J. May 31st, 1909.

The pleadings in this case consist of relator's petition, respondent's answer and a demurrer to the answer or return.

The facts involved in the consideration of this case are few, and are here briefly stated. The relator and respondent were rival candidates at the last municipal election for the office of auditor of the borough of Dunmore. The election was close, and the controversy between the parties relates to the vote of the third district of the sixth ward. The returns of the election were made to the clerk of the quarter sessions as provided by law. The returns from the said third district are as follows: The open return so called; that is, the return-sheet, gives Hall 45 votes and Smith 157 votes; the tally-sheet gives Hall 49 votes and Smith 157 votes. If the return-sheet is correct Smith is elected auditor; if the tally-sheet is correct Hall is elected. After the returns were filed the clerk proceeded to tabulate the vote; that is, he entered the results as shown by the

returns in a docket or book-kept by him for that purpose. In doing this the clerk, or his deputies, used the tally-sheets, one person calling out the total vote for each candidate and another entering the figures in the docket. When the tabulation of the Dunmore borough returns was completed and computed, it was discovered that Hall was elected by three votes. On the day after, an affidavit was presented to the clerk signed by all the officers who officiated at the election in said third district, in which affidavit it was set forth that the tally-sheet was incorrect; that Hall received only 45 votes and not 49 votes, and that the unsealed return-sheets, as well as the duplicate and triplicate return-sheets, showed that fact, viz., 45 votes for Hall. The clerk, or his deputy, thereupon changed the figures on the docket, entering 45 votes for Hall instead of 49, and this resulted in the election of Smith by a majority of one. An important additional fact is that only 203 votes were cast in the third district at said election. It will be thus seen that if the tally-sheet is correct, the 49 votes for Hall and the 157 vote for Smith would call for a total of 206.

The foregoing facts are before us and are properly deduced from the pleadings.

Under these facts, is the relator entitled to judgment in his favor?

In the arguments of counsel and in the briefs submitted to us, several legal questions are raised.

First: For the respondent it is claimed that election returns from townships and boroughs are to be filed in the prothonotary's and not in the clerk's office, and, therefore, that a mandamus cannot issue against the clerk. We are aware of the fact that there are cases in some of the lower courts in which this contention is upheld; but our own court, for several years and in several cases, have maintained the other view. And we are sustained in our position by some well-considered opinions of other common pleas judges. Having again examined this question we hold that all election returns from townships and boroughs must be filed in the office of the clerk of the quarter sessions.

Second: One of the main contentions of the relator is that the clerk, having fully and finally computed the Dunmore borough vote on February 18th, had no right to change the entries made in the docket and that he must issue a certificate of election in accordance

with the entries so made. The weakness of this contention is apparent when we state that there is no law requiring the clerk to keep a docket of the kind mentioned. It is true that for the orderly and convenient transaction of business in the clerk's office such a docket is necessary; but in itself it has no standing in the eye of the law. The actual legal returns of an election, so far as the clerk's office is concerned, are the returns themselves that are brought to the clerk's office by the judges of election. And any certificate issued by the clerk touching an election must be based upon the returns, and upon nothing else. Nor has the clerk any power to "compute" election returns in the same way that the common pleas "computes" them. The clerk has no discretionary power. He is not a "returning" or a "computing board". It is clear, therefore, that the changing of a figure by him on the docket is of no moment, as far as the present case is concerned. The question is: What do the returns show? In answer to the position as stated by us, it may be said that the clerk did exercise judicial power by deciding that Hall received only 45 votes and by discarding the tally-sheet. If he did this, it was a mistake. And it was a mistake to receive an affidavit from the election board alleging they had made an error. The clerk is not a court. The law does not give him judicial power to correct such errors. It would be a very dangerous procedure to allow an election board to come into clerk's office two days after election, especially if the election is a close one, and by filing an affidavit, change the returns which have been made according to law, and thereby possibly change the result of an election. Even the court itself would hesitate to do this, and it certainly would not do so without giving all parties in interest an opportunity to be heard. We do not mean to intimate that in the present case there was any intention on the part of the clerk to deprive anybody of an office by receiving and filing the affidavit of the election board. The act, on the part of the board and of the clerk, appears to have been done innocently with the intention of correcting an error; but such a practice is contrary to law and may bring about deplorable results. We may state here that there is some misapprehension as to the legal efficacy of what is known as a certificate of election. The certificate is simply a statement of what the record contains. It states that certain persons received certain num-

ber of votes for a certain office. It does not pretend to state who is elected. The figures must show that. Let us take, for instance, the case now under consideration. We shall suppose that both Hall and Smith came into the clerk's office and ask for what is known as a certificate of election. The clerk is bound, under the law, to give each one the same kind of a certificate, on payment of the proper fee. What should the certificate contain? It can only contain what the record shows, and the record is made up of the election returns. For convenience the clerk may add together the votes received by each candidate in all the districts of the borough, except the third district of the sixth ward. How will he state the vote received by Hall in this district? Will he say 45 and thus elect Smith? Or, will he say 49, and thus elect Hall? In other words, will he decide the title to an office by a stroke of the pen? The only truthful certificate he can give is one that will state the exact truth. He will state as to the third district that according to the return-sheet Hall received 45 votes and that according to the tally-sheet he received 49 votes. It is not for the clerk to try a quo warranto or a contested election case. We have discussed the duties and powers of the clerk to a greater extent than we intended at first; but we consider the matter of sufficient importance to be treated at some length.

Third: We shall now consider the question which, in our judgment, is the most decisive against the relator. There are three facts unquestionably before us under the pleadings. (1), The third district tally-sheet gives Hall 49 votes, and Smith 157 votes; (2), the return-sheet gives Hall 45 votes; and Smith 157 votes; (3), the list of voters shows a total of 203 persons voting. This certainly discredits the the tally-sheet to the prejudice of one or the other of the candidates. If the return were before us when acting as an a computing board in the common pleas, we would accept the record shown by the return-sheet and direct the vote to be entered accordingly, leaving the losing candidate to his remedy at law, viz., a contested election. It is true that as a general rule the tally-sheet prevails, because it is the actual record from which the return-sheets are made; but when the tally-sheet is itself discredited, either by mutilation, or by a fraudulent alteration, or, as in this case, by showing a total vote in excess of the total number of persons voting, the tally-sheet should be dis-

carded, It may be pertinently said that because there is an excess of votes shown in the tally-sheet, it does not follow that this excess is in the Hall vote. It may be found in the Smith vote. This must be conceded; but, how are we to decide that question, except in a contested election? We certainly cannot decide it in the present proceeding. This element of uncertainty is fatal to the relator's prayer in this case. It is a well known rule that when a relator fails to show a clear right in himself, or a corresponding duty in the respondent, in addition to the lack of another adequate, appropriate and specific remedy, a mandamus will not be granted. This is the chief ground on which we refuse a mandamus against the respondent.

We ought to explain away an apparent inconsistency. We have stated our views as to the character of the paper usually known as a certificate of election. Technically, the relator is entitled to such a certificate; but we have taken it for granted that the kind of a certificate he wants and prays for is a certificate that will give the vote for Hall in the said third district as 49 instead of 45. It is on this basis that we have considered the case.

Now, May 31, 1909, judgment is entered on the demurrer for the respondent, with costs; and the writ of mandamus is refused.

In the Orphans' Court of Lackawanna County.

No. 481, Year 1907.

In Re: The Estate of William E. Kirby, Deceased.

Sur Exception to Account.

Executors and Administrators-Commissions-Amount of Compensation.

The usual rate of commissions of executors and administrators is five per cent. on personalty, and this rate is only departed from in exceptional cases. The burden is on the party seeking to increase or diminish the rate of compensation over or under the usual rate.

Mr. H. D. Carey, for exceptants.

Mr. J. E. Burr, for accountants.

Opinion by M. F. Sando, P. J. August 16, 1909.

The only question, raised by the single exception filed, relates to the account of commissions charged by the accountants. The fund embraced by the account amounts to \$76,007.66. It was com-

posed of the proceeds of the sale of merchandise and fixtures in the store of the decedent and some bank stock; money in various banks, rents accruing prior to the death of the decedent, interest on bank deposits, and interest and principal collected on various mortgages and judgments. Commissions at the rate of five per cent. were deducted by the executors and their allowance was objected to by the exceptants, the widow and daughter of the decedent.

To determine the amount of compensation to which the accountants are entitled, it becomes necessary to inquire into the nature of their duties and the extent of their services.

In the estate at bar, the decedent died August 7, 1907; the inventory filed November 6, showed a total of \$100,634.18; and the first partial account of the executors was confirmed nisi on March 15, 1909. The decedent had been an undertaker, dealer in furniture and an investor. The stock of goods and merchandise amounted to \$10,040.36. His real estate consisted of a four story apartment house in Carbondale, and a property in Jermyn in this county, and another in Forest City, Susquehanna County. As an investor he was largely interested in mortgages; had considerable money out in mortgages and judgments; possessed some bank stock; and had a number of bank accounts.

The accountants collected the deposits from nine different banks in Buffalo, Elmira, Binghamton, Middletown and New York, in the State of New York, and brought them into this jurisdiction. Much correspondence, covering a period of two months, was necessary with the banks in New York, and a guarantee was given to the banks making payments to the executors, exempting them from liability on their part. One of the executors being a bank cashier, by reason of a courtesy extended by bank officials one to another, payments were made to the executors on the informal guarantee of the bank of the one executor, otherwise due legal proceedings would be required, in the nature of letters ancillary before the collection could be made. The estate was saved additional expense for counsel, or letters, and no tax was paid to withdraw the various sums on deposit. The entire amount thus collected was \$8,343.71.

There were twenty interest bearing accounts in banks in six different cities and towns in Pennsylvania, in Wayne, Luzerne and

Lackawanna Counties. The decedent resided in Carbondale. The accounts outside of Carbondale have been closed and transferred to the executors, and left to their credit. Outside of Scranton the collections involved correspondence; in Scranton the matters were attended to in person.

The executors conducted the business of the decedent until the sale of merchandise and fixtures, which brought the inventory prices. Negotiations for the sale were carried on with three different parties, and involved some labor and careful investigation. The sale realized \$9,710.30. Other personalty was sold, and the bank stock was converted into cash.

The executors have collected about five thousand dollars on the book-accounts, classified as collectible, doubtful and worthless, amounting to \$15,178.55; all the principal and interest on the mortgages and judgments, numbering eighteen, with the exception of two; income amounting to \$2,800; rents due at the time of the decedent's death amounting to \$145.61, from fourteen different tenants on properties in Carbondale, Jermyn and Forest City; and collected some fire insurance money due on a loss at Forest City, paid to them till some question of ownership is settled.

An executor attended each day while stock and merchandise was inventoried by experts; the decedent kept no books; when the estate came into the hands of the executors, they found only memorandums and bills, which made it necessary to employ a bookkeeper to get the amounts in books in a systematic manner. Much time was required in sending out notices to debtors requesting them to come in and pay; and considerable time was required in giving proper attention to the parties when they came in to pay.

While there was no special trouble, yet it required time in the negotiations with the various persons, for the sale of the stock of goods and merchandise. One of the incidents in making the sale was in arranging a loan for purchasers.

Partial distribution has been made, to the widow, \$15,800; to the daughter, \$2,700; and the disbursements, amounting to \$8,631.99, are mostly in small sums.

These facts are an essential element in any inquiry into the compensation which should be awarded to the accountants. In the nature

of things, no rule can be framed which will meet with mathematical precision the conditions of every case. The nearest approach to a formula is to be found in the language used in various cases, that an executor will be required to exercise only common skill, prudence and caution, and that the amount of compensation is ruled by no fixed standard but is determined by the peculiar circumstances of each particular case: *Snyder's Appeal*, 54 Pa., 69. There is no minimum rate of commission fixed by rule of law. There is no set rule. The rule is fair compensation: *Moore's Estate*, 211 Pa., 343.

The usual rate of commission of executors and administrators is five per cent. on personalty; *Barhite's Appeal*, 126 Pa., 404. And this is not usually varied from except for cause: *Eshelman's Estate*, 74 Pa., 42, or departed from only in exceptional cases: *Eachus's Estate*, 2 Chester, 152. If excepted to, the burden is on the exceptant to reduce below the ordinary allowance: *Watson's Estate*, 6 Luz. Leg. Reg., 13; *Rockafeld's Estate*, 4 Lanc. Law Rev. 113; *Spackman's Estate*. 2 Chester, 153. The burden is on the party seeking to increase or diminish the rate of compensation over or under the usual rate: *Pearson's Estate*, 8 North. 23.

In *Young's Estate*, 4 Lack. Jur, 99, cited by counsel for exceptants, a reading and examination will disclose that it was clearly within the rule laid down by the cases, in that the burden on the party seeking to diminish the compensation claimed under the usual rate, was duly established.

Without further elaboration, we are of the opinion that the rate of commissions charged by the executors may be taken as a fair and moderate standard of compensation. Nor does the evidence disclose any sufficient reason why the commissions should be less than five per cent., the usual rate.

And now August 16, 1909, the exception filed to the first and partial account of the executors, is dismissed.

Issued shares in a corporation are held, in *Sprague vs. Hosie*, (Mich.) 15 Det. L. N. 847, 118 N. W. 497, 19 L.R.A. (N.S.) 874, to be goods within the meaning of the statute of frauds, and oral contracts for their sale which do not comply with the terms of that statute are held to be invalid.

In the Court of Common Pleas of Lackawanna County.

No. 185 November Term, 1907.

Stanley Rumovicz, et al. vs. Scranton Electric Company.

Rule for Judgment for Defendant Non Obstante, Etc.

Negligence—Electric Wires—Infant—Owner's Use of Property.

Where an electric light company operates in a proper, lawful manner its plant in a building situated on land owned by itself, and B, a child of eleven years of age, in company with other children, has been accustomed to enter upon, and in this instance does enter upon, the lot upon which the electric plant is located and presumably puts his hand through a broken window pane and receives a shock from some of the company's wires within the building and is injured in consequence, there being nothing to show that the shock and injury resulted from any gross or wanton negligence on part of any employe of the company, neither the child nor the father can recover any damages for the injury.

The doctrine of "attractive nuisances" discussed and explained.

The cases of Thompson vs. R. R. Co. 218 Pa., 444, distinguished and differentiated from the cases of Henderson vs. Refining Co. 219 Pa., 384 and Walsh vs. Rwy. Co. 221 Pa., 463.

Mr. Homer D. Carey, for plaintiff.

Mr. W. D. Curry, for defendant.

Opinion by E. C. Newcomb, A. L. J., September 13, 1909.

There was verdict for plaintiffs in an action by father and son for injuries to the son occasioned by his coming in contact with an uninsulated electric wire on defendant's premises. At the close of plaintiffs' case defendant asked for binding instructions. The present motion is founded on the refusal of that request. The facts are free from complication.

As a part of its light and power plant in the village of Dickson City the defendant had on its premises a brick building used as a storage house. It stood twenty or thirty feet from the street. The lot not being enclosed the intervening area was from time to time resorted to by boys at play. Inside the building electric wires were strung. Their purpose was not disclosed at the trial. Therefore they were presumably there for some use in the conduct of the company's business. At the end nearest the street the wires ran along the wall just inside a window, of which the sill was upwards of two feet from the ground. To some extent the glass, consisting of small panes, had been broken, apparently by boys throwing stones. It had been in that condition for some weeks, if not months, before the

accident. While the boys had been accustomed to play on the ground, none had been known to meddle with the building itself, otherwise than by throwing stones. In July, 1907, Edward Rumovicz, then eleven years old, was passing there with two other boys, all of whom lived in the neighborhood. Out of curiosity they turned aside to look in through the window. Apparently they put their hands on the sill. In some way, which neither could explain, Rumovicz received an electric shock, thereby sustaining a severe injury. It was taken for granted at the trial, and will be assumed now, that either consciously or unconsciously, he put his hand through the broken window far enough to touch one of the wires.

Subject to the general question reserved, the case was submitted on the allegation of negligence set out in the statement. True it was also alleged that the wires had been intentionally charged by defendant for the specific purpose of inflicting an injury under the circumstances of this accident. That, however, was wholly unsupported and the question left to the jury was whether the defendant was guilty of negligence in failing to keep the glass, or some other barrier, in place in view of the proximity of the wires to the street and the known habit of the children to play and idle about the premises.

The question now is whether the case was for the jury at all.

Had the defendant strung and charged the wires in the open lot after knowledge brought home to it that persons, whether children or adults, were accustomed to resort there, a different question would be presented. The same would be true if, seeing the boys at the window with their hands on the sill, an employe of the company had charged the wires without warning them. But there was nothing of that kind. No servant of the company was about. Apparently the wires were in their usual condition as required in the company's operations. Hence the liability, if any, must arise solely from what has been called the principle of "attractive nuisances." That doctrine, however, so far as I can find, has in no jurisdiction been extended to injuries to a trespasser arising from machinery within private buildings to which the intruder gets access through a window without the permission, and in the absence of the owner or those representing him. If it were so every proprietor of a mill or factory would

operate it subject to the duty of active vigilance in keeping trespassers out. That is not the law.

On review of the case I cannot distinguish it in principle from *Thompson vs. R. R. Co.*, 218 Pa., 444. There children were accustomed to resort to the railroad yard. That was enclosed by a high board fence, broken in places and having gates usually open. In the yard was a turntable. When not in use, instead of being kept locked, it was fastened only by a brake which anyone could open. A boy of eight years entered the yard at night through the open gateway. He stood near the table as it was being turned by other boys at play. A projecting bar struck him whereby he was thrown into the pit and seriously hurt.

In reversing judgment on a verdict for the boy the course of decision on the present subject in our own and other jurisdictions was extensively reviewed by the supreme court. In effect the doctrine of the so called "turntable cases" as it had been generally understood was repudiated. The proposition that the owner of private property may incur liability to a trespasser for an injury induced by mere childish curiosity or heedlessness, unconnected with any negligence in the use of his property, was rejected as unsound in legal theory and unsupported by the weight of authority. It was held that the fact that the person injured was a child makes no difference in the absence of negligence, and that as regards an adult the facts in that instance showed no breach of duty. It was said: "He was where he had no right to be, on the property of the defendant, which it was using in a lawful manner for a lawful purpose in the conduct of its business. It owed him the duty not to injure him intentionally, but it was under no duty to take care of him either by keeping him out of the yard or by protecting him after he entered it from his own acts or the acts of others who, like him, had entered without permission." This must be regarded as the settled rule in this state.

But it is contended by the learned counsel that the question here is ruled otherwise by *Henderson vs. Refining Co.*, 219 Pa., 384, and *Walsh vs. Rwy. Co.*, 221 Pa., 463. In my judgment both are clearly distinguishable from the present case. In the *Henderson* case a permissive way across a vacant lot had become established.

It formed a well marked line of communication between two dwelling houses on opposite sides of the lot. It led from the side door of one to a gate opening out from the other. All three parcels belonged to defendant. The houses were occupied by its tenants. A boy had occasion to go to one the houses. When he left he went out by the exit opening on the path. He was hurt by being caught in some way in the machinery of a pumping plant then recently set up by defendant either on or at the edge of the path. It must be noted that the path had acquired its status with the implied consent of the defendant before the machinery was placed there. The supreme court, therefore, held that the boy was not a mere trespasser. The path had become an appurtenance to the houses as part of the curtilage. In other words, the boy was using the path under the defendant's *quasi* license. The machinery formed a menace to the safety of those lawfully exercising an ostensible right which had attached to the premises. There was nothing in the mere location of the machinery which would operate to extinguish the apparent right of way of those having lawful occasion to go in or out by that entrance. The case in no way weakens or narrows the general rule that the land owner owes no duty of protection to those who may intrude on his premises. On the contrary it was distinctly held that the facts took it out of the scope of that rule.

In *Walsh vs. Rwy. Co.* the defendant had a power house for the operation of a cable on an unenclosed lot adjacent to the street. Children resorted to the lot as a playground. On the occasion in question a girl of eight years was attracted there by a fight in which some boys were engaged. The machinery was then idle and the man in charge absent. She stood within two feet, or less, from the door of the motor house, and in dangerous proximity to the cable if in motion. Defendant's employe returned, facing her as he came and almost brushing against her as he entered the door. Without warning her he immediately put the machinery in operation. The frayed and broken strands of the cable caught the girl's clothing and being drawn into the machinery she was injured. It is apparent that the circumstances might well charge the defendant's employe with knowledge of her peril, and make his act in starting the machinery one of wanton recklessness. And it was so held. While the rule

started in *Thompson vs. R. R. Co.* was again reaffirmed and it was again said that "the standard of duty in such case is the same whether the person injured be an adult or a child", it was further said: "There was, however, a duty not to injure her intentionally or wantonly by any act to expose her to danger. If the man who started the motor knew at that time that the plaintiff was standing between the rails close to the frayed cable, which would touch her dress when in motion, and from his knowledge of the circumstances was conscious that she would be exposed to danger if the machinery was put in motion, a duty of care arose, as it would in case of an engineer who sees a child on the track in front of his engine."

As between these cases and the one at the bar I can see no analogy. On the contrary the present case is to my mind clearly within the general rule of immunity as regards an injury to a trespasser where the land owner is making a lawful and proper use of his property.

For that reason the defendant was entitled to binding instructions. The rule to show cause is made absolute and judgment is now directed to be entered for defendant on the point reserved *sec. leg.*

In the Court of Common Pleas of Lackawanna County.

No. 16 September Term, 1909.

In Equity.

*Commonwealth of Pennsylvania Ex Rel. P. J. Moore, Mine Inspector,
vs. James B. Murrin, et al.*

Rule for Preliminary Injunction.

*Injunction—Mining Operations—Breakers—Location of Boilers—
Interpretation of Act of June 2, 1891, P. L. 176.*

Where a breaker has been erected and in operation prior to the passage of the Act of June 2, 1891, P. L. 176, and a boiler for generating steam was set up alongside it, a new boiler may be installed on a new and different foundation though only twenty-five feet away from the breaker notwithstanding the words of the Act of June 2, 1891, which provide as follows:—"It shall not be lawful to place any boiler or boilers for the purpose of generating steam, under or nearer than one hundred feet to any coal breaker or other structure in which persons are employed in the preparation of coal: Provided, that this section shall not apply to boilers or breakers already erected"

Section 2, Article V of the Act interpreted.

Messrs. O'Brien, Kelly & Fitzgerald, for plaintiff.

Mr. J. B. Murrin, for defendants.

Opinion by E. C. Newcomb, A. L. J., September 24, 1909.

The defendants are coal operators in Fell township. The relator is the state inspector of mines in whose subdivision of the second anthracite inspection district defendants' colliery is located. Under section 2, article V. of the act 2d June, 1891, P. L. 176, he filed a bill to test the defendants' right to relocate the steam boiler used in their mining operations. At the same time he moved for a special injunction, and a rule to show cause was accordingly granted.

The hearing developed no disputed question of fact. On the contrary, the parties agreed of record that the allegations of the bill are true. That reduces the controversy to a single question of law, namely, the construction of one clause of the statute. The section is as follows:

"It shall not be lawful to place any boiler or boilers for the purpose of generating steam, under or nearer than one hundred feet to any coal breaker or other structure in which persons are employed in the preparation of coal: Provided, that this section shall not apply to boilers or breakers already erected."

The defendants' colliery was equipped with a breaker for the preparation of coal. The breaker was erected and in operation before the act was passed. The boiler had been set up alongside the breaker and has continued so ever since. Having occasion to install a new boiler the defendants now propose to locate it on a new and different foundation, but within twenty-five feet of the breaker.

The question is whether that is within the prohibition of the act, or is excepted by the proviso.

Such cases as have risen under the act throw little, if any, light on this particular question, which so far as we can find has never been considered. It must be decided, therefore, on first impression. Yet it is apparently free from difficulty. The language of the proviso is very simple and its meaning and effect appear to be plain.

If it mentioned boilers only, its most obvious meaning would be that as then located though within less than a hundred feet from the breaker, they were not to be interfered with by the act. In that

case an attempt to relocate the boiler within that distance might appear to be against the statute and so might be restrained. It must be assumed, however, that the further words "or breaker" were intended to widen the scope of the exception. As such their effect is to except from the operation of the act not only boilers and breakers already erected. If the breaker be excepted it necessarily draws to it, so to speak, the right to have the boiler located wherever the operator chooses. This view might not be so obvious if the words used were "boilers and breakers." But they are used disjunctively. Hence the question here is precisely the same as if boilers were not mentioned at all in the proviso. Taking that out there would remain a plain and unequivocal exception from the act of such breakers as were then in operation, and that is the conclusion to which we are led in this instance. On the facts before us the breaker stands as though no such act had ever been passed. For that reason no case is presented for a preliminary injunction and the rule to show cause is discharged.

In the Court of Common Pleas of Lackawanna County.

No. 854 October Session, 1906.

*In Re: Petition of the County Commissioners of Lackawanna County
for Improvement of County Line Road.*

Exceptions.

*County Roads—Report and Recommendations of Grand Jury—Act of June 26,
1895, P. L. 336.*

Where, under the provisions of the act of Assembly of June 26, 1895, P. L. 336, there is submitted to the Grand Jury of a County the question of the construction of a County road, and the Grand Jury makes certain recommendations and directs the performance of certain preliminaries before the work is begun, on the filing of exceptions, alleging and showing that the recommendations of the Grand Jury have not been attended to and carried out, the Court will disallow the application for the improvement of the road.

Mr. John J. Toohey & Hon. John P. Kelly, Attorneys for County Commissioners.

Messrs Wells & Torrey, for Exceptants.

Opinion by H. M. Edwards, P. J., June 5th, 1909.

Several important questions are raised by the exceptions filed in this case. It is not necessary for us to consider all the exceptions. Our discussion will be confined to the action of the grand jury.

While we do not decide the question of the sufficiency of the preliminary survey and estimates, we suggest that they are quite unsatisfactory and incomplete. As to the application of the act of 1895 to the improvement of a road running through boroughs as well as through townships, recent legislation has made the discussion of this question of no use for any practical purpose.

The exception relating to the action and report of the grand jury is a meritorious one. It is true that the grand jury certified their approval of the improvement; but they have also attached to their approval certain recommendations. These are, (1) that the county commissioners secure releases from all abutting property owners from any damages that may be caused by the construction of said road; (2), that agreements be secured from all property owners or from all boroughs and townships through which the road shall pass to curb and grade said road; (3), that a written agreement be secured from the Scranton Railway Company to pave three and one-half feet of each side of the centre of all their tracks, whether single, double or switch, wherever their tracks traverse the proposed road. The grand jury further recommended that all the foregoing requirements be complied with before the construction of the road is begun. It is contended on the part of the petitioners that the above recommendations of the grand jury may be treated as surplusage; but it is difficult to avoid the conclusion that the approval of the grand jury of so large and expensive an undertaking was based upon the fulfillment of the conditions described in the additional recommendations. The same grand jury that recommended the county road and gave the project their approval also recommended that the road should not be begun, in other words, not built, until (or, unless) agreements were secured so that the curbing and grading and a part of the paving should be done at somebody else's expense—an expense running necessarily into many thousands of dollars. Whatever may be said as to the extent to which the grand jury were influenced by the considerations referred to, we are of the opinion that the approval of this body should be secured after it has had full and exact knowledge of the cost of so great an enterprise as the building of the road in question as well as an accurate understanding of the limitations of of the future liability of the county in case the road should be built.

The act of assembly provides that upon the hearing of exceptions the court may, for cause shown, disallow the application for the improvement of the road. In the the present case we decide that a proper cause has been shown, and we therefore disallow the application of the petitions for the improvement of the road prayed for in their petition.

In the Court of Common Pleas of Luzerne County.

No. 18 June Term, 1908.

Rule for Bill of Particulars.

Smith et al. vs. Lehigh Valley Railroad Company.

*Pleading—Trespass—Negligence—Bill of Particulars—Res
Ipsa Loquitur.*

A bill of particulars in trespass for negligence may be allowed in the discretion of the court, but the practice is unusual and not to be encouraged, a demurrer being the proper remedy where the statement of claim is not sufficiently specific.

Where the statement avers that defendant's train of cars left the track and crashed into the plaintiff's house, injuring her, a bill of particulars setting forth what acts or omissions constituted the negligence will not be ordered, the rule of law being that where the thing causing the injury is under the management of the defendant and the accident such as does not ordinarily happen with proper care, a presumption of negligence arises.

Messrs. J. T. Lenahan and J. L. Lenahan, for plaintiffs.

Messrs. Wheaton, Darling & Woodward, for defendant.

Halsey, J.—On Jan. 25, 1906, Mary Smith, the wife plaintiff, occupied a home with her husband and child on Pennsylvania avenue in the city of Wilkes-Barre. The defendant company on that date operated a railroad upon which they had a train of cars in the vicinity of the plaintiff's home. It is alleged by the plaintiffs that the train of cars, through the negligence of the defendant, left the tracks of the defendant company, crashed into the home of the said plaintiffs, where Mary Smith, the wife, with the baby in her lap, were sitting; that by reason of the train leaving the track and crashing into the house she and the child were injured.

The defendant contends that it is entitled to a bill of particulars showing what acts or omissions of the defendant constituted the negligence and carelessness alleged in the plaintiffs' statement.

This is an action of tort based upon an allegation that the damage done to the plaintiffs was the result of negligence on the part of the defendant. It is further alleged that the cars that did the injury were exclusively in the possession of the defendant and its servants. The plaintiff wife and child were sitting in their home, and were so situated as not to be able to have seen what negligence caused the cars to leave the tracks and crash into the house, doing the injury alleged, and for which damages are sought.

In an action *ex delicto*, a bill of particulars is not demandable of right, but in a proper case the granting of it is within the discretion of the court.

In *Furbush vs. Philips*, 2 W. N. C. 198, it is held that it appears to be settled that the court may order a bill of particulars even in tort if the justice of the case acquires it, but we do not think this is such a case. The practice is unusual and not to be encouraged. If the declaration is not sufficiently specific, the proper remedy is by demurrer: *Glaser vs. Lewis et al.*, 14 W. N. C. 228.

Taking the position that a bill of particulars in action founded in tort is within the discretion of the court as to its allowance, we think that the allegations contained in the plaintiffs' statement are of such a nature that a bill of particulars ought not in this case be allowed upon the items of such bill as set forth in the defendant's affidavit.

We do not go into the question as to what burden will be imposed upon the plaintiffs in making proofs of the allegations of negligence as set forth in the plaintiffs' statement.

In *Sherman & Redfield on Negligence*, §§ 59 and 60, the rule applicable to the proof of negligence in a case such as is stated in the plaintiffs' action, is as follows:

The accident, the injury and the circumstances under which they occurred are in some cases sufficient to raise a presumption of negligence, and thus cast on the defendant the burden of establishing his freedom from fault. When the thing which causes the injury is shown to be under the management of the defendants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. (See, also, on this point, *Thompson on Negligence*, 1227-1235; *Cooley on Torts*, 706, and 16 Am. & Eng. Ency. of Law, 448, and cases there cited; *Shaffer vs. Lacock et al.*, 168 Pa. 497.)

As this application appears to be within our discretion as to whether it shall be granted or not, we think from the plaintiffs' statement of negligence alleged and the circumstances surrounding such negligence, that it should be denied. Rule discharged.

In the Court of Common Pleas of Crawford County.

No. 33 May Term, 1908.

Certiorari.

MURPHY VS. BOOTH.

Amendment—Striking Off Parties—Act of May 4, 1852.

Where a summons against several as copartners issued before a justice and service was made upon only one of the defendants, who appeared personally at the hearing and admitted his individual liability, held, that the justice had jurisdiction, under section 2 of the Act of May 4, 1852, P. L. 574, to strike off the names of the other defendants and enter judgment against the defendant who appeared.

M. C. Powers, for plaintiff.

Thomas & Thomas, for defendant.

Opinion by Prather, P. J.

The plaintiff brought suit before M. C. Powers against defendants, and a summons was issued to William Booth, E. A. Humeston and E. E. Humeston as a partnership, doing business as the Humeston Hay Company, and the constable made return as follows: "Served on the defendant E. A. Humeston."

On the return-day E. A. Humeston was present, and as it appears upon the argument of this case, his counsel was also with him and represented him at the trial.

It also appears from the record that E. A. Humeston upon the trial of the case, admitted that he was indebted to the plaintiffs in the amount they claimed, but the Humeston Hay Company, representing William Booth, E. A. Humeston and E. E. Humeston, was not a party to the contract but that it was his individual indebtedness. Thereupon the alderman struck out the partnership name and the names of William Booth and E. E. Humeston, leaving the record stand as F. F. Murphy and Emma Murphy vs. E. A. Humeston, and granted judgment against E. A. Humeston, the remaining defendant.

E. A. Humeston then took out a writ of *certiorari* to review the proceedings, and assigns for error:

"1. The said alderman had no jurisdiction to enter judgment against one of the members of a partnership without entering judgment against the firm and all the other members.

"2. The justice was without jurisdiction as to E. A. Humeston in his individual capacity, and therefore had no power to enter judgment against him, he never having been summoned except as a member of the firm.

"3. The summons shows that it was a partnership that was summoned and not E. A. Humeston in his capacity as an individual.

"4. It was not proven, nor was there any attempt to prove, that E. A. Humeston was a member of said firm."

The first three exceptions all raise the question of the alderman's right to amend his record, and may be considered together. Courts have authority to direct amendments when justice requires it.

By section 2 of the Act of May 4, 1852, P. L. 574, it is provided: "Courts shall have power, in any stage of the proceedings, to permit amendments by changing or adding the name or names of any party, plaintiff, or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party."

It is clear that if this case had been brought into court on appeal, and an application had been made to amend, it would have been allowable: *Continental Jewelry Co. vs. Dewey*, 33 Pa. C. C. Reps. 544; *Bratton vs. Seymour*, 4 W. 329; *Johnston vs. Fessler*, 7 W. 40; *Gue vs. Kline*, 13 Pa. 60; *Seitz vs. Buffum*, 14 Pa. 69; *Comfort vs. Leland*, 3 Whart. 81; *Eyster vs. Rineman*, 11 Pa. 147; *Merrill vs. Tammany*, 3 Pa. 433; *Graham vs. Vandalore*, 2 Watts, 131.

In *Kidney vs. Beemer*, 27 Pa. Superior Ct. 558, in affirming the lower court, the facts are in part reviewed and set forth as follows: "The defendant relies on a technicality for the reversal of this judgment. It is this: The plaintiff brought his suit against Beemer and a large number of other persons. The summons was served on some of these, but upon many of the others no service was had. When Beemer filed his affidavit of defence, he alleged that the co-defendants mentioned in this affidavit are not bound in any sum, for no contract relation between them and the said plaintiff is sufficiently averred in the statement filed, and none ever executed anything which is enforceable under the facts set forth in this case.' Upon Beemer filing his affidavit of defence on behalf of the alleged co-defendants, and failing to state who, if any person or persons, were liable with him to the

plaintiff, a motion was made on behalf of the plaintiff to amend by striking out of the case the names of all the parties defendant, except James G. Beemer, trustee, and James G. Beemer, alleging in the petition to amend that the said defendants' names had been joined by mistake, and that the plaintiff was led into this mistake by Beemer, one of the defendants. Upon this petition and motion the court permitted the amendment, and this left the case and pleadings against Beemer, trustee, and Beemer personally. Thereupon, on argument, the court held that the affidavit of Beemer was insufficient and granted judgment against him."

That justice may be done between the parties upon the merits of issue, courts are required to allow amendment of the pleadings, even after verdict and judgment, by adding to or striking off the names of parties to the action: *Patton vs. Railway Co.*, 96 Pa. 169; *Weaver vs. Iselin*, 161 Pa. 385.

It is urged, however, that E. A. Humeston was not summoned nor was he in court at the trial of this case.

In the case of *Dusenberry vs. Bradley*, 88 Pa. 444, relied upon by exceptant, the Supreme Court, reversing the lower court, said: "If Murphy had been in court, . . . but he never had a day in court nor was there any effort made to bring him in."

We are not prepared to say that E. A. Humeston was not in court, especially when we regard the manner of service and his response to it.

In the case of *Wilson vs. Wilson*, 3 Clark, 419, the action was brought against Wilson individually. Before hearing, the justice sent him notice that the action was intended to be against him as executor. The defendant did not appear and the justice entered judgment against him as executor.

E. A. Humeston was the only person named as defendant that was served with summons; he responded to the summons and brought with him his attorney, who represented him at the hearing; he admitted his individual liability. The plaintiffs claimed interest on the debt for six years; and upon argument it appears that, if this judgment were reversed, plaintiffs' claim would be barred by the statute.

The defence is one of merest technicality and absolutely without merit. If the defendant was taken by surprise at the amendment

and counsel desired a further hearing or opportunity to defend, his counsel might have asked for it.

As to the fourth exception, it raises a question of fact for the justice over which we have no authority on certiorari. If E. A. Humeston was not a member of the partnership he would have been improperly joined, and the amendment of the record, as made, would have been right beyond argument.

The exceptions are all dismissed, and proceedings before the alderman are affirmed.

In the Orphans' Court of Lancaster County.

No. 18 January Term, 1908.

Exceptions to Adjudication.

Kerstein's Estate.

Estate for life with power to sell—Act of February 24, 1834.

Where a testator leaves his estate, real and personal, to his wife for life or during widowhood, with power to use or sell the same either for her benefit or that of the estate, without naming a trustee, the balance should be awarded to her absolutely; she need not give security under Act of Feb. 24, 1834, P. L. 73.

In such case, if the widow marries or dies, the sum awarded, or as much thereof as was not used by her, goes as directed by the testator and not as of her estate.

The following exceptions were filed to the adjudication:

"1. The court erred in awarding absolutely to Caroline Kerstein, widow of the decedent, the entire balance of the estate.

"2. The court erred in not awarding to Caroline Kerstein, widow, the balance of the estate only so long as she shall continue the widow of the testator."

Messrs. Coyle & Keller, for exceptions.

Mr. William R. Brinton, contra.

Opinion by Smith, P. J., May 5, 1909.

The following is the important part of G. Charles Kerstein's will: "I give and devise unto my beloved wife Caroline all that I die possessed my lands and tenements and parcels of ground all monies due or to become due real personal and mixed together with the appurtenances to hold to her, my said beloved wife Caroline, and her assigns for and during all the term of her natural life in case she shall so long continue my widow, she paying the taxes thereof

and keeping the building in tenantable repair. I also give my wife Caroline the right during her widowhood in case of need to sell any of my property or use any of my estate for her personal benefit or to sell my property for benefit of my estate."

It is apparent that it was not the intention of the testator to give his entire estate unconditionally to his widow, and quite as apparent is it that it was not his intention to give her only the income of it for life or during widowhood. To whom did the estate go upon the death of the testator, and, therefore, to whom ought it to have been awarded? A trustee was not named, and manifestly none was intended. Can it be successfully contended that it was the intention to have one forced upon the beneficiary in the event of her not being able or willing to give security as provided by section 49 of the Act of Feb. 24, 1834, P. L. 73? If such was not the intention, then it was not the intention to give an interest "for life, or for a term of years, or for any other limited period, or upon a condition or contingency," as contemplated by this act. While the testator gave less than an absolute estate, he certainly gave more than a use for life. If his wife's needs required it, to her all of it was absolutely given, and she is the one to decide what she needs, and which, if fairly done, none has a right to interfere with. If the interest to her is to be considered as one for life only, then, failing to give security, she will be obliged to satisfy a trustee of her needs, awaken his judgment, and, as is usual, invoke the assistance of the court to convince him that it is hers, and not his discretion, which is first to be considered. It is fair to infer that no testator who gives to his wife without the intervention of a trustee the right to consume his estate ever intends her to be afflicted by any such annoying and expensive condition. In Hager's Estate, 17 Dist. R. 1015, where the testator gave to four daughters for life, with power to use the principal, we said: "Their power of disposition only was restricted. If they did not use all of it, they had no right to dispose of what remained, certainly in no other way than as was directed by the testatrix. After the death of the survivor, it went as part of the decedent's estate under the provisions of her will: Tyson's Estate, 191 Pa. 218. It could have been argued that the estate in remainder vested at the death of the testatrix, subject to being divested,

subject to being reduced or taken by the daughters. The argument which appears to us to be more in harmony with the testatrix's intention is that the whole estate immediately upon her death vested in her daughters, subject to no disturbing conditions. If, however, it or a part was left, it then vested in those contingently selected by her. We find no more substantial reason for the theory than an estate can be vested, and then by reason of happenings become divested, than that an estate can be vested and by reason of happenings become revested. If the whole estate is consumed by those in whom it vested, there would be no revesting and so also if they bequeathed what remained to those for whom it was conditionally intended by the testator."

The testator not only makes his "wife Caroline and her assigns" the custodian of his estate, "real, personal and mixed," but also gives to her individually, not as executrix, the power to sell his property, and for either her benefit or that of the estate.

We think the award was properly made. Of course, if Caroline marries or dies, the sum awarded, or as much thereof as was not used by her, will go as directed by the testator and not as of her estate: *Tyson's Estate*, 191 Pa. 218.

The exceptions are dismissed and the adjudication is confirmed absolutely.

An employee engaged in removing earth for the foundation of a building is held, in *Rankel vs. Buckstaff-Edwards Co.* (Wis.) 120 N. W. 269, 20 L.R.A. (N.S.) 1180, not to be a fellow servant of an expert employed for a short time to break up frozen ground by blasting, where the former has nothing to do with the placing, packing, or discharging of the explosives, although he drills the holes to contain them.

Intoxicating liquor is held, in *Hines vs. Stahl* (Kan.) 99 Pac. 273, 20 L.R.A. (N.S.) 1118, not to be subject to seizure on execution because the statute forbids its sale except by certain persons, for restricted purposes, and upon affidavit of the buyer showing the occasion for his purchase.

In the Orphans' Court of Lackawanna County.

Nos. 103, 104 and 105, Year 1908

In Re: The Estate of George John and Florence Miller, Minors.

Sur Rule to Vacate and Annul Appointment of Guardian.

Guardian and Ward-Appointment of Guardian Vacated.

A second appointment of a guardian for a minor, while a former stands unrevoked and in force, is a nullity.

Mr. John F. Scragg, for rule.

Mr. Jas. F. Davis, contra.

Opinion by M. F. Sando, P. J.

Upon petitions presented to this court, Mary Burmeister was on February 17, 1908, appointed guardian of the minor children of John Miller, deceased; qualified as such, and gave bonds, which bonds were duly approved.

On March 21, 1908, Augusta Hahn, probably without any knowledge of the prior appointment of Mary Burmeister, and without notice to her, who had not been discharged, was appointed guardian for the same minors and qualified by giving a bond in each estate, which bonds were duly approved. The appointment of Augusta Hahn was made inadvertently, and without full knowledge at the time on the part of this court of the prior appointment.

In Pote's Appeal, 106 Pa., 574, Mr. Justice Clark holds a second appointment, while a former stands unrevoked "null and void."

The Court has power to vacate or annul an appointment for causes existing before and at the making of it, but of whose existence it was not aware, or whose legal consequence it misapprehended or misconceived.

Where the Court appoints a guardian, when there is one in existence, it may on the petition of the earlier guardian revoke the appointment of the second: *Estler vs. Estler*, 1 Browne, 322.

Now June 22, 1908, the rule is made absolute, and the appointments of Augusta Hahn, as guardian of George Miller, John Miller and Florence Miller, minors, are vacated and annulled, and she is discharged.

In the Court of Common Pleas of Lackawanna County.

No. 2 November Term, 1909.

In Equity.

The Sterrick Creek Coal Co. vs. Borough of Winton, Et Al.

Motion for Preliminary Injunction.

Injunction—Borough Sewer—Variance between the term of Ordinance and Contract—Rights of a taxpaying third party.

The construction of a public sewer had been in progress several months when a tax-payer's bill was filed against the Borough and the contractor to enjoin its further prosecution, on the ground that the contract involved the creation of a municipal debt in excess of the two per cent. limit. On motion for a preliminary injunction there was nothing to support the averment except a clause in the contract purporting to bind the Borough for so much of the contract price, if any, as it should fail to secure through special assessments of private property as benefits. In this it varied from the ordinance, providing for the improvement, which limited the liability to the amount so secured. At the hearing the contractor released any claim under that clause of his contract.

Held: That, prima facie, the effect of this action on his part was to relieve the case of any question which could be raised by a tax-payer, and that the motion should be denied without prejudice to the plaintiff's rights should there be any attempt in future to enforce the clause in controversy.

What are the respective rights and liabilities of the parties to the contract in view of the variance between it and the ordinance, not decided.

Messrs. H. A. Knapp and John R. Wilson, for plaintiff.

Messrs. John P. Kelly, George D. Taylor and James J. O'Malley, for defendants.

Opinion by E. C. Newcomb, A. L. J.

October 5th, 1909.

This motion is incidental to a taxpayer's bill to enjoin the borough, its officers and its contractor from carrying out a contract for the construction of a public sewer in the borough of Winton. It is alleged, (1), that the contract contemplates the creation of indebtedness beyond the lawful limit of two per centum, without the approval of the electors; (2), that as between the ordinance providing for the sewer and the contract there is a variance in this; that the terms of the ordinance limit the borough's liability to such sum as shall be secured and collected by special assessments, while by one clause in the contract the borough binds itself to make good to

the contractor any difference between the amount so realized and the contract price. Accordingly it was asserted that the sum of \$5,000 had already been paid to the contractor by a borough order. This proves to be unfounded.

The two allegations merge into each other. There is nothing to support the first unless this deficiency clause in the contract would create a general liability. If that be its effect it would follow that the contract is open to the first objection, because it is agreed that at the date when it was made the borough liabilities had reached the two per cent. limit.

The contention of the borough is that as between it and the contractor the variance is immaterial because their respective rights and liabilities are defined by the ordinance, coupled with the specifications, and the acceptance of the contractor's bid which was based solely on the ordinance. Hence, it is urged that the formal contract is the act of the executive officers only; that it is in law subordinate to the ordinance to which in case of conflict it must yield; that so far as in apparent conflict with the ordinance it can avail the contractor nothing as being *ultra vires*, and, therefore, incapable of enforcement.

This might well be true in an action wholly between the parties to the contract. Whether so between the parties to this case is by no means free from doubt. In adverse proceedings to enforce the contract it can be assumed that the contractor, would get nothing more than what the borough was bound to pay. But third parties are not bound to assume that there will be no voluntary payment according to the letter of the contract. The contractor might demand more than the collections realized, because his contract says so in the event of a deficiency. Third parties are not bound to assume the borough will in that case make him test his rights in court. But the point need not now be decided. That has become unnecessary by the action of the contractor at bar. He has put upon record his relinquishment of any right under that clause of the contract and agreed that it may be treated as reformed by striking this provision out. As the clause is wholly for his benefit and the action can prejudice the rights of no other person I see no reason why that cannot be done. That would seem to relieve the case of the only question

capable of litigation at the suit of a taxpayer. It is true that viewers appointed to assess cost and expenses according to benefits have not yet been reported. It may be the total assessments will fall short of the contract price. But that will be the concern of the contractor alone. He declares his willingness to submit to a decree so modifying the contract that, in conformity with the ordinance, it will limit the liability of the borough to such sum as, with due diligence, shall be secured and collected by special assessments. To this the borough assents. If that be agreeable to the plaintiffs such decree can be made on final hearing and amendment of the bill at the pleasure of the parties. Otherwise it could not. That would secure to the plaintiffs the only right which they can assert by a taxpayer's bill. If they do not see fit to do that the suit will remain pending and should there be any attempt to pay the contractor out of the general revenues of the borough it will be time enough then for the plaintiffs to move for an injunction. As the case now stands such order is unwarranted especially in view of the fact that the work has been in progress since last May and the contractor had already laid out \$11,000 or upwards when the bill was filed about two weeks ago.

The rule to show cause is discharged and preliminary injunction is refused.

The owner of a life estate in land, who effectually attempts, as administrator of the former owner, the property as belonging to the estate, is held, in *Millican vs. McNeill* (Ten.) 114 S. W. 106, 21 L. R. A. (N.S.) 60, to be estopped to say that the deed does not pass title to his life estate, and therefore the grantee is rightfully in possession until such estate terminates, so that the remainderman cannot maintain an action for possession until that time.

One on trial for misdemeanor who without leave, voluntarily departs from the court room after the case has been submitted to the jury, and before the court has adjourned, and remains away when the verdict against him is received, is held, in *State vs. Waymire* (Or.) 97 Pac. 46, 21 L.R.A. (N.S.) 56, to waive his statutory right to be present at that time.

LEGAL MISCELLANY

Growth of Law Respecting Automobiles

The extraordinary development, in a few years, of travel on ordinary highways in motor vehicles of all kinds, some of them well-nigh as powerful as railroad locomotives, necessarily presents a variety of legal questions which affect the interests and rights of almost the entire public. Well-settled principles of the law of negligence, are of course, applicable in all kinds of cases, but their specific applications are often perplexing. It is not easy to forecast what judges and juries may think will or will not constitute negligence in accidents of a novel character. But in the past decade there has already accumulated a considerable body of decisions respecting the rights and liabilities of those who operate automobiles. That the use of such a machine on a public highway is not negligence, as a matter of law, was explicitly laid down by the Court in *Indiana Springs Co. vs. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L.R.A. (N. S.) 238; and this proposition had, of course, been taken for granted by all users of such machines. The liability for frightening horses is, of course, one of the most obvious risks in the use of such vehicles on highways. In *Christy vs. Elliott*, 216 Ill., 31, 108 Am. St. Rep., 196, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, involving the effect of a statute requiring an automobile to stop upon approaching a horse which appeared to be frightened, the court held that the statute applied if, "by the exercise of reasonable diligence on the part of the driver," it would have appeared that a horse was frightened, and that in such case no signal from persons in the carriage drawn by the horse was necessary to impose on the driver of the machine the duty to stop. The body of existing decisions on the law governing the use of such vehicles was reviewed in the annotation to these cases. But very recently several of the questions on this subject have been before the Courts. The liability of the owner of an automobile for injuries caused by its use in the hands of a servant or a third person who had taken it from the garage without the owner's knowledge or consent, and not in the exercise of any employment by the owner is denied in *Jones vs. Hoge*

(Wash.) 92 Pac. 433, 14 L. R. A. (N. S.) 216, as well as in *Lotz vs. Hanlon*, 217 Pa. 339, 118 Am. St. Rep. 922, 66, Atl. 525, 10 L. R. A. (N. S.) 202, and there are other cases to the same effect. Any decision to the contrary would impose a liability on the owner of an automobile more extreme than is applied to the owners of horses or ordinary vehicles. It would certainly be a most extraordinary ruling that would hold the owner of a machine liable for damages done by it when it was tortiously taken, without his knowledge or consent, from his own premises, or from some place where it was lawfully kept for him. In the case of *Jones vs. Hoge*, stress was laid upon the fact that it was taken from a public garage by the owner's servant, and that he was not a competent and careful operator. But the Court held that as the servant did not take it in the course of his employment, but solely for his own personal use, the master had no responsibility for it. To similar effect it was held in *Cunningham vs. Castle*—App. Div.—, where a chauffeur had taken the vehicle for his own use with permission from the owner. In *Mahoney vs. Maxfield*, 102 Minn., 377, 113 N. W., 904, 14 L. R. A. (N. S.) 251, under a statute making it the duty of the operator of an automobile on a public road to stop the machine upon signal from the driver of a horse, it was held that this statute did not absolutely require the stopping, in such a case, of the motor machine, in addition to stopping the vehicle itself, but that the question whether the failure to do this constituted negligence or not was to be determined by the circumstances of each case. It was also held in *House vs. Cramer*, 134 Iowa, 374, 112 N. W., 3, 10 L. R. A. (N. S.) 655, that the failure to arrest the sparker of a machine upon making a brief stop in front of a corner store did not constitute negligence *per se*, but this was treated as a question of negligence on the facts of the case. The fact that a team was frightened by the explosions of the motor while the automobile was standing was held not to make the operator liable if, after he saw the team was frightened, he could not stop the noise in time to prevent the damage. Some statutes require the motive power of such machines to be stopped if it seems necessary to avoid accident, but under such a statute, it was held, in *Rochester vs. Bull*, 78 S. C., 249, 58 S. E., 766, that the failure to stop the motor, the noise of which frightened a team of

mules as they came suddenly around a sharp curve in a road, made a question for the jury. Other cases on the general question of liability with respect to horses on highways are found in the annotation to 14 L. R. A. (N. S.) 251. A more unusual case, presenting the rights, instead of the liabilities, of the user of an automobile on a highway, is that of Daugherty vs. Ayer, 83 N. E., 677, 14 L. R. A. (N. S.) 816, in which the Massachusetts court held that an automobile is not a carriage within the meaning of a statute requiring towns and cities to keep their highways reasonably safe and convenient for travelers with their horses, teams, and carriages, and that a town is not liable for failure to make special provisions for the safety of automobiles, if its ways are reasonably safe and convenient for travel generally. The court further held that an accident to an automobile beyond the limits of the highway, though it was on a surface of sand level with the road, and the marks of travel had been obliterated by an alteration of the road, did not make the town liable, since it was not required to keep the adjoining land in repair, and there was no such dangerous condition as to require the erection of a barrier to mark the limits of the road. A question was raised as to want of proof that the automobile was lawfully registered and licensed but the Court held that this was not fatal in itself to a remedy for injury to the machine by a defect in the highway, since the presumption of law and fact was in favor of innocence, though, if the machine was run in violation of the statute, the owner could not have a remedy. This case is certainly one of unusual importance to the owners of automobiles. Many highways may be safe for ordinary travel, without being safe for automobiles. A note to the case, on the duty to have a highway safe for automobiles, shows that there is no other case which passes upon the specific question of the duty to have a highway or street free from innerent defects which would render the operation of automobiles thereon unsafe. A somewhat similar case, however, is referred to. This was Corcoran vs. New York, 188 N. Y. 131, 80 N. E. 660, which involved an alleged defect in a public street ending at a steep declivity, which was protected only by a guard rail and a picket fence, which was too unsubstantial to be of much protection in case of an automobile. The court said the city was not under any duty to make a more substantial barricade, as the fence and rail were doubtless sufficient for ordinary emergencies, but that the

place should have been well enough lighted to give fair warning that it was merely a cul-de-sac, or so well guarded as to prevent entrance to the point of danger. The question raised by these cases will doubtless more frequently demand the attention of the courts hereafter. The liability for the breaking of a bridge under an extraordinary strain, such as that made by attempting to cross it with a steam traction engine, has arisen in various cases. The case of *Wabash vs. Carver*, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851, holds that it is not negligence *per se*, as matter of law, to attempt to cross a highway bridge with a traction steam engine, water tank, and threshing machine. A note to the case shows that other decisions generally regard it as a question for the jury to decide, whether or not such extraordinary vehicles are entitled to use a highway bridge. But questions of this sort are not likely to arise in respect to automobiles, since the heaviest of them will not often impose upon a bridge a greater burden than it is accustomed to bear.—*Case and Comment*.

The owner of a life estate in land, who effectually attempts, as administrator of the former owner, to convey the property as belonging to the estate, is held, in *Millican vs. McNeill* (Tex.) 114 S. W. 106, 21 L.R.A.(N.S.) 50, to be estopped to say that the deed does pass title to his life estate, and therefore the grantee is rightfully in possession until such estate terminates, so that the remainderman cannot maintain an action for possession until that time.

An osteopath licensed under the state statute to practise his profession is held, in *Randel vs. Department of Health*, 193 N. Y. 133, 85 N.E. 1067, 21 L.R.A. (N.S.) 49, to be a physician, within the meaning of a municipal ordinance requiring a physician's certificate as to the cause of death of persons dying under his care, and a regulation of the board of health refusing a burial permit in the absence of such certificate, and to be entitled to registration as such, under a provision of the ordinance requiring physicians to register with the health department.

In the Court of Common Pleas of Lackawanna County

No. 1271 September Term 1907.

In Re: Appeal of the Borough of Blakely from Auditors' Report.

Rule to show cause why an appeal nunc pro tunc should not be allowed.

Borough Auditors—Incorrect Report and Misleading Statements—Appeal Nunc pro Tunc.

Borough Auditors, who, upon making an incorrect annual report and statement of the financial condition of a Borough, are requested and required by the Borough Council to correct their report and statement and file the original of the same with the Borough Secretary and a copy in the office of the Clerk of the Court of Quarter Sessions. In answer to certain questions of the Borough Councilmen the Auditors make misleading answer and leave the impression that they will correct their report and file the same in the Court of Quarter Sessions. It subsequently develops that, without making any effort or attempt to make correction in report, the report and statement had already been filed in the Court of Quarter Sessions for over thirty days.

Held:—That, notwithstanding the lapse of the thirty days within which time the Borough should ordinarily have filed its appeal to the report and statement of the Auditors, the Borough shall have the right to an appeal nunc pro tunc by reason of the action of the Auditors which misled the Borough Council.

The case of Dunmore Borough vs. Wahlers, 28 Sup. Ct., 39, cited and distinguished.

Messrs. Houck and Benjamin, for appellants.

Mr. James J. O'Malley, contra.

Opinion by H. M. Edwards, P. J. Feb. 10, 1909.

STATEMENTS OF FACTS

1st.—That the three regular Borough Auditors audited the accounts of the Borough for the year ending March 4, 1907, but no original statement or report of the audit, dated and signed by the Auditors, was filed with the Secretary or Clerk of the Borough up to August 5, 1907.

2nd.—That on May 13th, 1907, a printed statement, not dated or signed, however, by the Auditors, was given to the Borough Secretary, who then requested the filing of the original report, which was not done.

3rd.—That the Borough Council, believing that more commissions were paid than are allowed by law; that the audit and statement made by the Auditors was incorrect; that moneys of the sinking fund were used for general Borough purposes, secured the services of a special accountant to go over the Borough books and records.

4th.—That the special audit showed that the audit and statement made by the Auditors were incorrect, and a meeting was held July 17, 1907, by the Borough Council, the Auditors, the special accountant and other persons interested; at which meeting the Auditors were requested to correct their report and statement, and their attention called to the fact that they had not yet filed their report with the Borough Council or in the Court of Quarter Sessions.

5th.—That the Auditors, did not deny that their report had not been filed and thereby they misled Council into believing that the report, as a matter of fact, had not, been filed in the Court of Quarter Sessions, and furthermore they stated that they would so file it in its corrected form.

6th.—That, as a matter of fact, the audit and report was filed in the Court of Quarter Sessions on June 24, 1907, and the thirty days for taking an appeal expired July 24, 1907, and on July 27, 1907, the Borough Council received its first knowledge of this fact.

OPINION OF COURT

The facts of the case at bar differ materially from those of Dunmore Borough School District v. Wahlers, 28 Sup. Ct., 39, in which the order allowing an appeal nunc pro tunc was set aside. It appears from the depositions in the present case that after the auditors' report had been made, the attention of the auditors was called to certain alleged errors therein. The auditors agreed to meet and correct the errors, if any were found. While the Borough Council were waiting the action of the auditors the time for appeal went by and the auditors then refused to consider the matter any further. The council was thus misled and was lulled into inaction by the conduct of the auditors.

The rule to show cause why an appeal nunc pro tunc should not be allowed is made absolute and the appeal is allowed.

In the Orphans' Court of Lackawanna County.

No. 62, Year 1907.

In Re: The Estate of Mary A. Hall, Deceased.

Appeal from Register—Letters of Administration.

The Register of Wills, in issuing letters, acts in a judicial capacity, and unless he clearly abuses his discretion in so doing, the Orphans' Court will not interfere. Where the nieces of a decedent are named as administratrices and the nephew of the decedent and a stranger subsequently apply for letters, the former letters will be vacated.

Messrs. Leach and Morrow, for appellants.

Messrs. H. A. Knapp and George B. Davidson, contra.

Opinion by M. F. Sando, P. J.

Mary A. Hall, late of Glenburn, Lackawanna County, died intestate on November 22, 1906, leaving neither husband nor lineal heirs; survived by one sister, a resident of the State of Iowa; the only persons interested in her estate, residing in Pennsylvania being nephews and nieces of the same degree of consanguinity. On December 24, 1906, William C. Hall, a nephew, filed with the register a petition asking that letters of administration be granted on the estate of the decedent, alleging inter alia; that he was of next of kin; that he had a renunciation from the sister who was the only heir in that degree of consanguinity and requesting the grant of letters to George B. Morrow and William C. Hall; and, also that he had a petition signed by a majority of all the other heirs requesting the register to grant letters to William C. Hall and George B. Morrow. The renunciation of the sister and the petition of other heirs were filed with the register on January 21, 1907. On January 23, 1907, letters were granted to Lephe Hall and Jessie Hall, both nieces of the decedent. On January 25, 1907, William C. Hall took an appeal from the decision of the register in granting the letters of administration.

The register acted in a judicial capacity in the determination of the matter before him, and unless he has clearly abused his discretion, we cannot legally interfere with the result he has reached. The discretion given to the register as to granting letters of administration is limited to a selection from those asking the administration, from each class entitled to administration, in its order.

While the bill and exhibits cover 130 printed pages, there being fourteen exhibits, some of them very lengthy, the lines of the various controversies between the parties are well defined and require the application of only a few plain principles of law.

The transactions between the principal parties concerned in the case began on April 20, 1892. On that day four written instruments were executed. They are exhibits A, B, C and D.

EXHIBIT A. An agreement between Brooks and Mears and The Wilkes-Barre and Hudson River Improvement Company, hereinafter, for convenience, called the Hudson Company. This agreement includes a coal and tonnage arrangement between the parties, and the Hudson Company agrees to advance \$325,000 to Brooks and Mears on bond and mortgage for the development and improvement of their mines.

EXHIBIT B. An agreement between The Langcliffe Coal Company, first party; the Hudson Company, second party; and Brooks and Mears, third party. This is a tonnage agreement only. It is the same as Exhibit A, except that it contains no reference to the loan of \$325,000. Brooks and Mears join in the agreement because they were the owners of all the capital stock of the Langcliffe Coal Company. The land described in Exhibit B is not included in Exhibit A.

EXHIBIT C. The bond and mortgage given by Brooks and Mears to the Hudson Company to secure the loan of \$325,000, reciting Exhibit A and covering only the land therein described.

EXHIBIT D. An agreement between Brooks and Mears and the Hudson Company, providing, *inter alia*, that as Brooks and Mears were about to form a limited partnership association, which, when formed was to issue its first mortgage bonds to cover the amount unpaid on the said loan, the Hudson Company, on delivery to it of said mortgage bonds would "cancel and discharge" the bond and mortgage Exhibit C; and Brooks and Mears also agree that the said limited partnership association would enter into a tonnage contract with the Hudson Company, or any company it would name.

The foregoing agreements and bond and mortgage, all signed on the same day, are to be considered together. Brooks and Mears needed money to improve their coal properties and the Hudson Company wanted the coal. A tonnage agreement was entered into, a loan was arranged and a mortgage was given to secure the loan. This mortgage did not cover the land of the Langcliffe Coal Com-

pany. It could not legally, because the lessor of the Langcliffe land would not consent to a conveyance of it from the Langcliffe Coal Company to Brooks and Mears, and, consequently, it could not be included in the mortgage. Exhibit C. It appears, by later agreements, that it was intended all the time that the Langcliffe land should be security for the loan of \$325,000, equally with the Brooks and Mears land embraced in the mortgage; because all the land, the Brooks and Mears, and the Langcliffe's, constituting one mining operation, and the money advanced by the Hudson Company was used necessarily for the benefit of both properties. It is this element in the case the effort by means of subsequent agreements to make and hold the Langcliffe land liable for said loan in the same manner and to the same extent as the land included in the Brooks and Mears mortgage, that accounts for any complications in the controversy between the parties; and it is this phase of the case that gives the plaintiff a color of right to come into a court of equity for relief.

Before considering the subsequent agreements above referred to it is desirable to trace the history of the Brooks and Mears bond and mortgage, Exhibit C. The next paper showing what was done with the mortgage is,

EXHIBIT E. On August 15, 1893, the Hudson Company assigns the Brooks and Mears bond and mortgage to the Continental Trust Company. The assignment is made subject to the right to "exchange and substitute for said bond and mortgage the bond and mortgage upon the same property, of the joint stock or limited partnership in said agreement described" (being Exhibit D).

The next exhibit relating to the mortgage, although not the next transaction in point of time, is,

EXHIBIT I. This is a mortgage, dated March 23, 1896, given by the Langcliffe Coal Company, Limited, to the Continental Trust Company, of the city of New York. It is for the same debt and includes the same land specified in the original Brooks and Mears mortgage, and it recites the assignment of the latter or old mortgage to the Continental Trust Company on August 15, 1893.

It is evident that, according to the original intention of the parties, and prior to April 23, 1896, the Langcliffe Coal Company, Limited, was formed. In pursuance to the agreement of April 20,

1892, Exhibit D, and following the condition expressed in the assignment to the Continental Trust Company of the old bond and mortgage, the latter company accepted the new bond and mortgage from the Langcliffe Coal Company, Limited, in lieu of the old. The new mortgage recites the right to substitute one for the other and it contains the usual default clauses and the right to issue scire facias, &c. It is hardly necessary to discuss the law applicable to such a state of facts. All liability under the Brooks and Mears bond and mortgage has been cancelled. The debt has been extinguished. And this has been done, not by operation of a principle of law only, but by the express understanding and agreement of all the parties concerned. As to the law on this point we refer to *Hosler vs. Hursh*, 151 Pa., 415, and *Neal vs. Dempster*, 179 Pa., 569.

So far then, and without reference to any other agreements, the Continental Trust Company, or its successor, the plaintiff, holds the mortgage given by the Langcliffe Coal Company, Limited, as the only security for the loan of \$325,000. It has nothing else; and, for the enforcement of the payment of the amount of this mortgage it has a complete and adequate remedy at law.

This being the case, why does the plaintiff come into a court of equity? To answer this question, the other agreements not yet discussed must be considered. The source of plaintiff's claim to equitable relief must be found, if found at all, in the right of the plaintiff to the Langcliffe land as additional security for the loan and in the agreement as to the Langcliffe capital stock. Plaintiff contends that it cannot establish or enforce this right by any adequate legal remedy; and that if equity ought to intervene to adjudicate a part of plaintiff's claim, then, under a well known principle, equity has its grasp on the whole controversy. On this point we shall examine the other agreements, in order to ascertain how far the plaintiff's contention is sustained.

1. **EXHIBIT F.** This agreement is dated September 25, 1893. The parties to it are the Langcliffe Coal Company, the Hudson Company, and Brooks and Mears. It recites the "Brooks contract", (Exhibit A,) and the "Langcliffe contract", (Exhibit B). It sets forth more fully why the land embraced in the Langcliffe contract was not included in the Brooks and Mears original mortgage; and it proceeds to state that its intent

is to constitute the Langcliffe land an additional security for the payment of the loan of \$325,000. The agreement recites the oft-repeated clause as to the substitution of one mortgage for the other, and it sets forth a promise on the part of the Langcliffe Coal Company to pay the said loan at the rate of fifteen cents on each ton mined. The agreement has in it a sixty day default clause and there is attached to it a schedule containing a full description of the Langcliffe property. The eighth paragraph of the agreement reads thus: "This agreement shall take effect as of the 20th of April, 1892, and shall be deemed to be made as additional security for the payment of said bond and mortgage of the parties of the third part (Brooks and Mears) and of said substituted bond and mortgage, and for the repayment of said advance, and shall pass as an incident of said bond and mortgage, and of said substituted bond and mortgage, or any transfer thereof." The only promise made by Brooks and Mears in the agreement is that they will enter into a tonnage agreement with the Hudson Company when requested to do so.

2. EXHIBIT G. An agreement between Brooks and Mears and the Hudson Company, dated September 25, 1893, by which Brooks and Mears assign and transfer to the Hudson Company and its assigns the entire capital stock of the Langcliffe Coal Company, which was 3,000 shares. This agreement contains many recitals similar in character to those in the preceding agreement, Exhibit F; and it gives the Hudson Company full power, in case of default, to sell or transfer the whole capital stock assigned as aforesaid; or take possession of the property and work the mines.

On September 28th, three days after the date of the above agreements, the Hudson Company assigned the same to the Continental Trust Company. It is provided in the assignment that the Trust Company is not to assume "any of the covenants or agreements of said agreement (Exhibit F) on the part of the Improvement Company." This means that the Trust Company will not undertake to transport the coal and furnish cars, &c.; that is, all obligations incident to the tonnage arrangements still rest on the Hudson Company.

On this date, September 28, 1893, what is the situation of the Continental Trust Company in relation to the loan of \$325,000? What is the nature of the securities it has within its control, and what remedies are open to it to enforce the repayment of the loan in case of default?

First. The Trust Company has an assignment of the Brooks and Mears mortgage. This assignment was made in the preceding month of August. The mortgage contains the usual clauses as to default and provides the usual remedy for collection.

Second. The Trust Company has also Exhibit F, one of the agreements signed September 25, 1893. This is the additional security consisting of the property of the Langcliffe Coal Company. By this agreement the Trust Company has its grasp on the Langcliffe property in addition to the Brooks and Mears property. What is the legal character of this agreement? An examination of it will show that it is in itself a complete legal instrument imposing upon the Langcliffe Coal Company a definite legal obligation, capable of enforcement by an adequate legal remedy. The default clause in the seventh paragraph of the agreement reads thus: "In case of default on the part of the party of the first part, its successors or assigns, in any of the obligations hereof on the part of it, then or any of them, and such default shall continue for the space of sixty days, the whole of said principal sum of three hundred and twenty-five thousand dollars, with all arrears of interest, shall and may, at the option of the party of the second part, its successors or assigns, become and be forthwith due and payable." Without regard to this default clause and to the character of the agreement as an independent and separate instrument, in might be regarded in another light in view of the eighth paragraph of the agreement, which we have quoted in another place. By this paragraph the agreement is in effect attached to the Brooks and Mears mortgage; it is made to "pass as an incident of said bond and mortgage, and of said substituted bond and mortgage, or any transfer thereof." Why could not this agreement and the Brooks and Mears mortgage be treated as one obligation for the payment of the loan of \$325,000? And why could not a judgment be obtained in scire facias proceedings which would cover the Langcliffe property as well as the Brooks and Mears properties? It is not for us to decide now which one of three or four legal remedies would be the most effective. That should be left to the judgment of counsel. All we say at present is that we see no reason yet why plaintiff should come into a court of equity.

Third. In addition to the foregoing securities the Trust Com-

pany by Exhibit G in its grasp, as additional security for the same loan, the entire capital stock of the Langcliffe Coal Company, with summary power to dispose of the same. Under this agreement the Trust Company has more than one complete remedy incident to its ownership of the capital stock. The remedies are summary and quite drastic. In case of default in any of the conditions contained in the Brooks and Mears bond and mortgage the holder of said stock may deal with it as if the holder were the "absolute beneficial owner thereof"; or, the stock may be sold or transferred for such price as the holder shall think fit; or, the holder "may enter into possession of the corporate property, or any part thereof, and work said mines"; or, it may "as the owner of all the stock of said Langcliffe Coal Company, sell and realize the property of said Coal Company, or any part of such property", applying the proceeds "to the payment of said bond and mortgage of the mortgagors, or of said substituted bond and mortgage."

It therefore clearly appears that from September 28, 1893, to March 23, 1896, the securities in the hands of the Trust Company remained unchanged. It had the Brooks and Mears bond and mortgage; it had the Langcliffe property as additional security; and, as further security, it had the entire capital stock of the Langcliffe Coal Company. If, during this period, there had been any default in the payment of the loan, either of principal or interest the Trust Company had adequate and efficient legal remedies to enforce the payment of the loan. The date of March 23, 1896, was given by us above because it was at this time that the Langcliffe Coal Company, Limited, substituted its bond and mortgage for the original bond and mortgage of Brooks and Mears. The new bond and mortgage were given direct to the Continental Trust Company, as stated by us already. The Limited Company had evidently been formed as early as 1893 (after September 28th) because plaintiff's bill states that in 1893 and 1894 Brooks and Mears, by two deeds, had conveyed their interests in the lands embraced in the original mortgage, to the Langcliffe Coal Company, Limited.

Confining our consideration of this case now to the liability of Brooks and Mears and their individual estates, it appears clear to us that when the bond and mortgage of the limited association were

substituted for the original Brooks and Mears bond and mortgage, every vestige of individual liability on the part of Brooks or Mears was wiped out. There can be no question as to the soundness of this conclusion so far as the old bond and mortgage are concerned; nor can there be any question arising from the nature of the agreement, Exhibit F, because, so far as it touches the merits of plaintiff's contention this was the agreement of the Langcliffe Coal Company, a corporation, with the Hudson Company. It is true that Brooks and Mears signed the agreement; but an examination of its provisions will show that whatever was therein promised to be done which might be of any benefit to the plaintiff was promised by the Langcliffe Coal Company, and not by Brooks and Mears. But, independently of this fact, we hold that the plaintiff has an adequate legal remedy by which all of its rights under this agreement might be enforced, as we have already stated.

Therefore, so far as the present controversy relates to the individual liability of Brooks and Mears, there is nothing left but the agreement Exhibit G by which the entire capital stock of the Langcliffe Coal Company was assigned to the Continental Trust Company, which means to the plaintiff in this case. A large part of plaintiff's argument is devoted to this transaction. It is claimed that the plaintiff is a trustee for Brooks and Mears for the pledged stock; that the equities arising out of the relation of trustee and beneficiary cannot be adjusted in an action at law, and that this matter, being strictly cognizable in equity, draws to it and with it into a court of equity every other branch of the controversy between the parties. This argument seems plausible, and under a proper state of facts would be convincing; but the facts of the present case destroy the effectiveness of the argument. It must be remembered that neither Brooks and Mears, nor anybody representing their interests, are demanding relief on account of any act of a trustee in connection with said capital stock. From September 28, 1893, the plaintiff, or its predecessor, has had the absolute power to dispose of the stock by sale or transfer at any price it pleased in case of default in the payment of the loan of \$325,000. And Brooks and Mears had given the power to the assignee of the stock, not only to sell or transfer the stock, but also, in case of default in the payment of the loan, to

take possession of the property, work the mines and to take over the corporate organization of the Langcliffe Coal Company. Has the Continental Trust Company, or the plaintiff, at any time attempted to enforce any one of the ample legal remedies provided in the agreement Exhibit G? The precise date when the default in the payment of the loan first occurred cannot be ascertained clearly from the bill; yet, if several of the allegations of the bill are true, there was a default in the performance of some of the conditions of the various agreements quite early in the history of the transactions detailed in this case. It is stated that Brooks and Mears were in default. If that be the case, then the Continental Trust Company could have foreclosed the Brooks and Mears mortgage at some time during the period between August 15, 1893, the date of the assignment of said mortgage, and March 23, 1896, the date of the substitution of the new for the old bond and mortgage. Was the Langcliffe Coal Company in default, say from September 28, 1893, the date of the assignment of the agreements Exhibits F and G to the Trust Company, to the date of the giving of the new bond and mortgage in 1896? Then, and in that case, the Trust Company had a choice of legal remedies under said agreements. It had the right to take possession of the mines, or to sell the entire capital stock of the Langcliffe Coal Company, or to take over the company and reorganize it. It is a significant fact that when the Trust Company in 1896 accepted the bond and mortgage of the Limited Association in lieu of the Brooks and Mears bond and mortgage, nothing was done to enforce the obligations contained in Exhibits F and G, or to put the securities relating to the Langcliffe Company's property and capital stock in better or different shape. It may be that all the parties were satisfied with matters as they stood at that time; or, it may be that recognizing the uncertain value of the security of the Langcliffe property under Exhibit F, because of the defect in the title, the Trust Company did not choose to make any attempt to realize on this security, until the defect was removed by obtaining the consent of the lessor of the Langcliffe property to the alienation of the same. Of course the same objection would not apply to the agreement relating to the capital stock, viz., Exhibit G. At this point in the discussion and in connection with this phase of the case, we find it necessary to con-

sider two certain writings executed after the date of the new bond and mortgage.

EXHIBIT L. Agreement dated April 29, 1901. By this agreement, which recites the consent of the lessor of the Langcliffe property, the lease, &c., is assigned by the Langcliffe Coal Company to the Langcliffe Coal Company, Limited.

EXHIBIT M. A deed, dated April 29, 1901, by which the Langcliffe Coal Company, Limited, conveys to the Hudson Coal Company all its properties, subject to the mortgage of the Continental Trust Company.

Thus it appears that on April 29, 1901, the character of the Langcliffe property as a security was improved to the advantage of the Trust Company; and the Trust Company, at the date aforesaid, and up to the present time, has been and is in possession of three several securities for the payment of the same loan, with ample legal remedies for the enforcement of its claims. We cannot help commenting upon this unusual delay. Upon any default occurring between 1893 and 1896, the Trust Company could have proceeded on the Brooks and Mears bond and mortgage, and on the other two securities. From 1896 to 1901 it could have proceeded on the substituted bond and mortgage and on either or both of the other securities; and from 1901 to 1908, the date of the filing of the bill, the Trust Company was in better shape than ever to pursue its legal remedies on all the securities. Instead of asserting its rights at the proper time on the law side of the court, it waits until the two principal parties in the case are dead, and now it comes into a court of equity asking for relief, after a delay of seven, twelve, or fifteen years, as the case might be under the facts.

Without considering the question of *laches* we hold that the demurrers filed by the respective executors of the Brooks and of the Mears estates must be sustained on two grounds: (1), The plaintiff's bill discloses no ground for equitable relief as against the estates of Brooks and Mears, the plaintiff having had at all times adequate remedies at law at its command; and (2), the bill does not show any such liability on the part of Brooks and Mears as would require their estates to account as prayed for in the bill.

We shall now proceed to consider another ground of demurrer,

the same being assigned by each defendant, viz., the omission from the list of defendants of the New York, Susquehanna and Western Coal Company. In order to understand the force of this assignment we must refer again to some of the exhibits. Exhibit A, the first agreement between Brooks and Mears and the Hudson Company, provided not only for the advance of \$325,000 to Brooks and Mears, but also for a coal and tonnage arrangement. Brooks and Mears were to sell and deliver to the Hudson Company practically all the coal mined by them, and the Hudson Company was to pay for the coal monthly a certain price per ton based upon the prices at tide-water and to furnish a sufficient number of cars, &c. The bond and mortgage given by Brooks and Mears to secure the loan to them was to be paid in a certain way, viz., the Hudson Company was to deduct fifteen cents from the price of each ton of coal bought by it and to apply the same on the mortgage debt. Exhibit B is a coal and tonnage contract between the Langcliffe Coal Company and the Hudson Company, of the same character as Exhibit A, except that it contains no reference to the mortgage. Under this contract the Hudson Company may assign all its rights to a third party. There is a similar provision in Exhibit A. An analysis of the two exhibits lead us to the conclusion that there was no legal difficulty in the way of one party holding the coal and tonnage contract and another party holding the bond and mortgage; and that is what happened in this case. The Continental Trust Company, in 1893, by assignment, Exhibit E, became the owner of the bond and mortgage, Exhibit C, the Hudson Company still retaining its rights in the contract relating to the purchase and sale of the coal under Exhibit A and B. This was the situation on August 15, 1893, when the Hudson Company assigned the Brooks and Mears bond and mortgage to the Trust Company.

Later, on September 28, 1893, the Hudson Company assigned to the Trust Company the two agreements Exhibits F and G, the one constituting the Langcliffe property as additional security for the loan, and the other constituting the capital stock of the Langcliffe Coal Company as additional security for the same purpose; but the Trust Company "shall not be deemed to assume any of the covenants or agreements of said agreement (Exhibit F) on the part of the Improvement (or Hudson) Company." That is, the Hudson Company still had the coal and tonnage contract.

On December 4, 1893, according to the eleventh paragraph of Plaintiff's bill, the agreement itself not being given, the Hudson Company conveyed to the New York, Susquehanna and Western Coal Company the coal and tonnage contract of April 20, 1892, and the latter company "assumed and undertook all the covenants and agreements" of the Hudson Company. There is no reason why this could not be done. The Susquehanna Company simply took the place of the Hudson Company, and from December 4, 1893, the Trust Company was to receive its payments on the mortgage from the Susquehanna Company. We cannot ascertain from plaintiff's Exhibit N who paid the various sums of money credited on the mortgage; but, from 1893 to November 18, 1897, the Susquehanna Company was liable to the Trust Company for the payments on the mortgage. During this period the Susquehanna Company was the assignee of the Hudson Company's coal contract. At the end of this period, viz., on November 18, 1897 the Langcliffe Coal Company, Limited, entered into a direct contract with the Susquehanna Company as to the coal. It was the same kind of a contract as that of the Hudson Company, and is Exhibit J; and it provided for the payment of the mortgage in the same manner as in the other agreements. The Susquehanna Company continued to occupy the same relation with the coal properties until February 13, 1901. At this time the agreement, Exhibit K, was signed by the Limited Company and the Susquehanna Company. This agreement cancelled the original coal and tonnage contract between the Hudson Company and Brooks and Mears. We do not see that the plaintiff has just ground of complaint on this score; because, in terminating the old contract, it was provided that the agreement should in no wise affect the lien of the mortgage given by the Limited Company, nor in any way impair its obligation as to the payment of the fifteen cents per ton on all coal mined. Indeed, we find that from the beginning, at every step in the transactions between the parties, the Trust Company's mortgage has been protected, so far as that could be done by written agreements and conveyances. Even the last exhibit we shall refer to, which is a conveyance to the Hudson Coal Company of all the properties of the Langcliffe Coal Company, Limited, executed April 29, 1901, (Exhibit M), states in apt terms that the conveyance is made and received

We do not understand why the Susquehanna Company has not been made a defendant in this case. There is as much reason for making this company a defendant as there is for making the Hudson Company a defendant. Each bears the same relation as the other does to the Trust Company and its mortgage. The Hudson Company agreed to buy and sell the coal from the Langcliffe properties and to pay fifteen cents per ton on the mortgage. The Susquehanna Company agreed to do the same thing. We can gather from Exhibit N that the only thing done by the Hudson Company under its coal contract, was to advance the loan of \$325,000, because the first credit given on the mortgage was in 1896. And the money paid them must have been paid by the Susquehanna Company. It was the latter company that bought and sold the coal for many years, and the accounts of this company and its relation to the transactions in this case, if at all the subject of investigation in equity, are just as important as those of any other defendant.

We therefore hold that the New York, Susquehanna and Western Company should have been made a defendant in this case, and that the demurrer on this point should be sustained. It may be that the foregoing discussion is useless, in view of the opinion we hold as to the merit of the whole bill.

We shall now consider the other ground of demurrer assigned by the three defendant companies. It is, in substance, that the plaintiff has an adequate remedy at law. What are the prayers of the plaintiff in its bill? What are the particular forms of equitable relief it demands?

1. That the amount due on the mortgage of the Langcliffe Coal Company, Limited, be ascertained and that said amount be declared to be a first lien upon the property described in said mortgage.

2. That the rights of the complainant in the other property not specifically embraced in said mortgage be ascertained and decreed.

3. That the executors of the estates of Brooks and Mears, the Langcliffe Coal Company, Limited, the Langcliffe Coal Company, and the Hudson Coal Company, make discovery of the amount of coal mined from the several properties during certain periods, and that they account for the same.

4. That a receiver be appointed to take charge of the several properties.

5. That the court decree a sale of the mortgaged premises and of the other property.

The foregoing are the forms of relief prayed for by complainant. We have already discussed at considerable length the proposition that the plaintiff has an adequate remedy at law. All that we have stated is applicable to the demurrers now under consideration; but we shall briefly continue the discussion in the light of some well known principles of law.

First. We have no power to decree the sale of mortgaged property.

The leading case of *Ashurst, et al. vs. The Montour Iron Company*, 35 Pa., 30, decides this. We quote from the syllabus of this case:

"The courts of Pennsylvania have no jurisdiction in equity, to decree a sale of mortgaged premises, at the instance of the mortgagee; although the mortgagor may be a corporation, and the mortgage given in trust to secure its bonds. They might acquire jurisdiction in a suit by the cestuis que trust against the mortgagees, and having thus assumed jurisdiction of the subject matter, proceed to decree a sale for the benefit of the bond-holders; but they cannot do so at the suit of the mortgagees against the mortgagor."

Nor is the doctrine of the *Ashurst* case changed by *Winton's Appeal*, 97 Pa., 385, where a supplemental bill was entertained in aid of a final decree in equity, to compel the carrying out of the decree and to give full and complete effect to it; and, where, under exceptional circumstances, a sale of mortgaged premises was ordered.

A case very much like the contract and bond and mortgage involved in the case at bar is that disclosed in the *New York and Scranton Construction Company vs. Winton*, 208 Pa., 467. This case indicates to the plaintiff the remedy open to it on its principal security, viz., a *scire facias sur mortgage*.

Second. The plaintiff has no standing because of the prayers for discovery.

The discovery sought is not in aid of any action pending, or of any judgment or decree, or of any execution. On this point we refer particularly to *Black vs. Bohlen*, 175 Pa., 491, and to *Bank vs. Kern*, 193 Pa., 59, and *Holland vs. Hallahan*, 211 Pa., 223..

Third. There is no question of trust, or the rights of a trustee or of a cestui que trust, or of an account, in the case.

The nearest suggestion of such matters is found in the ownership by the plaintiff of the entire capital stock of the Langcliffe Coal Company; but, as we have already stated, the plaintiff has now, and has had for years, a choice of summary legal remedies in relation to this stock.

After a careful consideration of plaintiff's bill of complaint and of all the exhibits in the case, we are of the opinion that no such facts have been presented as would justify the interference of a court of equity. We therefore make the following order:

Now, June 28, 1909, after argument and on due consideration, the demurrer of each of the defendants is sustained and plaintiff's bill of complaint is dismissed at plaintiff's costs.

In the Court of Common Pleas of Lackawanna County.

No. 1661 September Term, 1907.

Rule for a New Trial.

Laura Gregory vs. W. S. Huslander.

New Trial—Attorney and Client—Confidential Relations.

Where, in a suit between a former client and her Attorney for the recovery of money by the client, the charge of the Court merely lays stress on the confidential relations between the parties, and a judgment is recovered, the Court will not grant a new trial.

The nature and extent of the confidential relations between client and Attorney stated and explained.

Messrs. Leach & Morron, for plaintiff.

Mr. S. B. Price, for defendant.

Opinion by H. M. Edwards, P. J., November 9, 1909.

The controversy in this case involves a transaction between an attorney and his client. Defendant had been attorney for the plaintiff for some length of time before the beginning of the transaction

referred to; and, while investigating some matters relating to the estate of Sylvanus Brown in which the plaintiff had an interest, he, the attorney, discovered that there was a certain small tract of coal to which the heirs of Brown were entitled and which had not been included in the account of the estate. The defendant called the attention of the plaintiff to this fact; and between them they arranged to purchase the interest of the other heirs, the plaintiff herself being the owner of an undivided one-sixth. The interests of some of the heirs were purchased amicably and deeds secured. The interests of the other heirs were obtained by partition proceedings. In all these matters defendant acted as attorney for the plaintiff.

It was agreed between the parties that the attorney should take the title in his name. This was done and he executed a declaration of trust, which he gave to the plaintiff, to the effect that he held the property, for himself one-half, and one-half for his client. The plaintiff put this declaration of trust on record. There was no attempt on the part of plaintiff at the trial to question defendant's right to a one-half interest in the property. She affirmed the arrangement on the witness stand. For this reason the question of varying the terms of a deed or written instrument by parol evidence is not in the case. The original arrangement, entered into in 1897, stands unimpeached.

We come now to the first point of the dispute between the parties. It appears that the expense of obtaining the title from the heirs, together with the expense of the partition proceedings and some other items, amounted to nearly \$1700. The plaintiff advanced this sum so as to secure a complete title. Plaintiff claimed the understanding was that this expense was to be deducted from the fund to be realized from the sale of the coal. Defendant denied this claim. The contentions of the parties as to this item were properly submitted to the jury, who evidently decided against the defendant on this point.

The next item in dispute was the amount of money paid S. N. Stetler for securing a purchaser for the coal. The coal was sold to T. F. Wells, who paid the defendant altogether, in several payments, from April, 1901, to November, 1904, the sum of \$6,217. Plaintiff when on the stand admitted that she knew Stetler was to be paid

something for his work, but that she did not know how much. Defendant testified that he had paid Stetler \$1500. Although the defendant was uncontradicted on this point his credibility as a witness was for the jury; and the question of this payment was submitted to the jury. It appears that at a former trial of the case the defendant had testified that he had gone to the bank and paid Stetler the \$1500 in one cash payment. At the second trial he said he was mistaken in that testimony and that he had only paid Stetler \$400 in cash and had given him a due-bill for \$100, and that then or soon after he had given him two notes of \$500 each payable respectively in six and twelve months. The defendant produced the two notes at the second trial. The signature of defendant on each note was torn away. There was no testimony other than that of the defendant that these notes had been in Stetler's hands, nor was there anything on the notes themselves indicating that they had been paid to Stetler; but, the notes were in the possession of the defendant and as far as that went there was a presumption of payment. Under the circumstances it was proper to submit the question of the payment to Stetler to the jury.

The third point of dispute relates to the amount of money paid by defendant to the plaintiff. The defendant claimed he had paid her \$2,430; or, in other words, he had paid her more than he owed her according to his contention. The plaintiff, on the other hand, testified very positively that all the money she had received from the plaintiff on account of the coal deal was the sum of \$1,000. It appears there were other money transactions between the parties. Receipts and checks and the evidence of experts as to handwriting, together with the evidence of the parties themselves, were submitted to the jury in a charge that, as it seems to us now, is not open to criticism on the part of the defendant.

We have referred to all the disputes of facts in the case. They were all submitted to the jury, who decided some of them against the defendant.

There can be no controversy as to the main question of law in the case. Defendant was attorney and trustee for the plaintiff; therefore, in a transaction between the parties in which the attorney secured a substantial benefit to himself, the burden was upon him to

show that the transaction was fair and conscionable, and that he took no undue advantage of his client.

"The parties were attorney and client. That relation gives rise to great confidence and the attorney is presumed to have the power to strongly influence his client, and to gain by his good nature and credulity, and to obtain undue advantages and gratuities. Hence, the law often declares transactions between them void, which between other persons would be unobjectionable. Unless the transaction is fair and conscionable it is deemed a constructive fraud:" *Shoemaker vs. Stiles*, 102 Pa., 549.

"When a relation of trust and confidence exists, the party in whom confidence is placed is held to the strictest accountability. The burden is upon him to show that a transaction between himself and his principal, by which he derives benefit, was fair and conscientious and beyond the reach of suspicion. The rule is founded upon motives of general policy and is irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. There must be full and clear proof that the transaction was the intelligent act of the party, fully explained to him, and performed with a thorough understanding of the transaction and of its consequences": *Darlington's Appeal*, 147 Pa., 625.

It is unnecessary to cite other authorities. We desire, in this connection to state that the case at bar is one in which the principle above laid down ought to be applied with its greatest effect. The plaintiff at the time of the trial was an old woman, eighty years of age, and the defendant has been her attorney for many years. Apparently she had always had implicit confidence in her attorney.

Keeping in view the relations of the parties and the high standard of duty required of the defendant in his dealings with his client we shall now consider the main reason assigned by the defendant for a new trial, and the only reason requiring discussion by us. It relates to the instructions of the court as to the effect to be given to a certain receipt signed by the plaintiff. Following is a copy of the receipt:

"Received, Scranton, Pa., December 9, 1904, of W. S. Huslander one thousand dollars, and by former payments the sum of thirteen hundred dollars, in full payment for shares of coal sold to Thomas F. Wells. Laura A. Gregory."

Defendant's third request for instruction to the jury was as follows:

"If the jury believes that Laura A. Gregory executed the receipt dated December 9, 1904, it is prima facie evidence of settlement and should not be set aside except for fraud, accident or mistake, and the cause of setting it aside should distinctly appear."

The request was answered thus:

"I affirm this point, but I add to it the following further explanation: That a receipt is like any other parol admission of the party signing it, and it is open to explanation or correction; and he may show that it was made by mistake or does not exhibit the truth or state all the facts."

The request is taken from the case of Rhoods' Estate, 189 Pa.; 460, and the answer is to be found in the case of Shoemaker vs. Stiles, supra. The request and the answer taken together, in our judgment, correctly state the law. In the Shoemaker vs. Stiles case the receipt was "in full".

The plaintiff in the case at bar in her testimony in her statement that the sum of \$1,000 was all she ever received on the coal deal and that she received that by check. There is no evidence to show that the matter was explained to her when she signed the receipt for \$2300, "in full payment for share of coal deal", nor that the receipt referred to former payments. It ought to have been fully explained to her that the check of \$1,000 was in final settlement of the coal deal, and the evidence should show this fact affirmatively.

On a review of the case we are of the opinion that the rulings on evidence and the charge of the court were as favorable to the defendant as they could be under the law and the facts. We cannot therefore disturb the verdict.

Now, November 8, the rule for judgment non obstands veredicto is discharged, and the rule for a new trial is discharged and a new trial refused. An exception is noted for the defendant.

A trademark is held, in *Com. ex. rel. Alexander vs. Kentucky Distilleries & Warehouse Co. (Ky.)* 116 S. W. 766, 21, L.R.A. (N. S.) 30, not to be property within the meaning of a constitutional provision requiring all property to be taxed.

In the Court of Common Pleas of Lackawanna County.

No. 1702 September Term, 1909.

New York Trust Company vs. Langcliff Coal Company, Langcliff Coal Company, Limited, and The Hudson Coal Company.

Exception to Affidavit of Defense.

Coal Lease—Royalty—Affidavit of Defense.

A coal lease recites and requires the payment of a certain fixed sum per ton as royalty, and no default has taken place.

Held, That this is sufficient, as an affidavit of defense, to prevent the entering of judgment for want of sufficient affidavit of defense.

Mr. William N. Hand, for Plaintiff.

Messrs. Welles & Torrey, for Defendant

Opinion by H. M. Edwards, P. J., November 8, 1909.

We are much impressed with the proposition that this case could be more satisfactorily disposed of by a trial than by a rule for judgment for the want of a sufficient affidavit of defence. Nevertheless the record is before us and the plaintiff is asking for judgment.

The elaborate arguments on both sides disclose the fact that there are several important questions, mostly of a legal character, about which the parties differ. We find that it is unnecessary for us to consider all the questions raised; because according to our present view of the case, there is one insurmountable obstacle in the way of entering judgment for the plaintiff. The mortgage provides a particular method of paying the principal and interest, viz., fifteen cents per ton on all coal above the size of pea mined from the property mortgaged. We cannot find that there has been any default in the payment of the debt or interest; nor are we satisfied that there is any other default by reason of which the plaintiff is entitled to judgment. It may be that at the trial the case of New York and Scranton Construction Company vs. Winton, 208 Pa., 467, can be made applicable to the case at bar; but it will require evidence on the part of the plaintiff to accomplish that result.

Rule discharged

Statement of the Law Relating to the Respective Rights of Owners of Surface and Underlying Veins of Coal.

As far as the private rights of property owners are concerned the law in Pennsylvania is pretty well settled and we do not hesitate to state what the respective rights of owners of surface and underlying veins of coal are. We have the benefit of many authorities of the Supreme Court of the state upon this subject and while it is not necessary to quote them all we will refer to some of them in order to support our views upon this branch of the subject.

Where there has been a horizontal division of land, the owner of each subjacent estate owes to the owner of the superincumbent estate the support of his land in its natural condition, and the owner of the superincumbent estate has conversely a right to this support. This is an absolute proprietary right, necessarily arising out of the ownership of the surface. The mine owner in taking out his minerals must leave sufficient support for the superincumbent land. This he may do by leaving ribs or pillars, or by constructing artificial supports. If he fails to do his and the land sinks, he is liable for the damage that occurs to the surface owner by reason thereof, and he may be enjoined by a court of equity from the further removal of his minerals. Whether the mine owner has worked his mines skillfully or negligently does not affect the existence of the right to surface support. The right is absolute, and causing the subsidence of the surface by mining beneath it is negligence, however carefully the mining operation may have been conducted. The owner of the minerals has a right to so much only as he can take out without injury to the surface.

The owner of the subjacent minerals may be relieved of the obligation to support the surface by a release from the surface owner or by the terms of the instrument creating his estate. But upon him who thus attempts to control the rule of law lies the burden of proof. He cannot destroy or injure the surface unless some statutory or contract authority exists for his doing so. The intention to part with the right of surface support must appear by plain and explicit language in the grant of minerals, or by an express exception from a

reservation of them. It may not be taken away by mere implication from language not necessarily importing such a result. In other words in order to relieve a mine owner from his obligation to support the superincumbent estate there must be a clear and unambiguous contractual provision conferring such relief. There must be a clear and distinct waiver of the right of surface support to relieve the mine owner from his obligation. In case of ambiguity or doubt the obligation to support the surface will be upheld.

These are the general principles which govern the respective rights of the parties in case of a horizontal division of land, so that one person owns the surface and another person owns the subjacent coal or other minerals. It is so laid down in *Barringer and Adams on the Law of Mines and Mining*, page 675.

In the case of *Madden vs. Lehigh Valley Coal Company*, 212 Pa. 63, these principles are adhered to by the Supreme Court of Pennsylvania. In the opinion we find the following language:

“It is conceded that in ordinary cases of horizontal severance of land, the subjacent estate even though without limit as to the right of removal bears with it an obligation of support of the surface: *Jones vs. Wagner*, 66 Pa. 429. And such burden will not be escaped by implication from language not necessarily importing such results: *Williams vs. Hay*, 120 Pa. 485. In the latter case the law was clearly stated as follows: ‘It is settled in this state that where one person owns the surface and another person owns the coal or minerals lying underneath, the under or mineral estate owes a servitude of sufficient support to the upper superincumbent estate. This principle has no application where the same person is the owner of both estates, nor does it apply where by the contract between the parties they have covenanted for a different rule. Like any other right the owner of the surface may part with the right to support, by his deed or covenant.’”

In the case of *Scranton vs. Phillips*, 94 Pa. 15, a case which went to the Supreme Court from our local court and which involved the question of the right to surface support to a church property situated on the West side, in this city, this same principle was enunciated and adhered to. And in one of the latest cases upon this subject, viz.: *Miles vs. The Pennsylvania Coal Company*, 217 Pa. 449, these same principles are reiterated in a long and exhaustive opinion

which was written by Mr. Justice Mestrezat on April 1, 1907. In his opinion he used the following language:

"It is settled law in this state that, in the absence of a contract providing the contrary, the owner of the mineral estate in a tract of land owes a duty, *ex jure naturae*, to the owner of the superincumbent estate of absolute support to the surface. The owner of the coal, like the owner of the surface, has an estate in land, but the former holds his subject to the right of the latter to demand that he do no injury to the surface by removing the coal. As we have said in a former case, the owner of the mineral must support the surface if it requires every pound of coal to be left in place for that purpose. There can be no doubt that such are the reciprocal rights of the owners of the surface and of the mineral estate in this Commonwealth. The several cases of this court on the subject conclusively determine the question. While, however, the owner of the surface is entitled as of natural right to its support by the owner of the subjacent mineral estate, it is equally well settled that the common owner of both estates, or the owner of the fee simple title to the tract of land, may by contract relieve the owner of the mineral estate from any duty to support the surface and from liability for any injury or damage done to it by mining and removing all the mineral. Being the common owner of the whole title, and, therefore, having the *jus disponendi*, he may make any legal disposition of the property he may desire. He may sell the coal and retain the surface, or he may sell the surface and retain the coal. In selling or leasing the coal, he may grant such rights to the vendee or lessee as either may desire or deem proper or necessary to remove the entire body of coal, as well as such rights in, through or over the surface as may be necessary for the same purpose. In other words, having the absolute dominion over the property he may grant such rights therein and thereto as may be agreed upon and are stipulated for in the contract. This naturally and logically follows from his ownership of the fee simple title to the property."

It, therefore, necessarily follows that whether in a given case a mine operator is liable to a surface owner on account of surface disturbances, caused by the mining out of pillars or the failure to leave sufficient support for the surface, either by leaving pillars of coal or by artificial support, depends upon the facts and circumstances of the case. If in such case the facts are that the one person owns the surface and the other person owns the coal and there has been

no waiver of the right of surface support, either by the surface owner or the person under whom he claims title, then the mine operator is liable for damages, and he may be restrained by injunction from so mining as to injure the surface. On the other hand, if the mine operator has not only the right to mine the coal, either by virtue of his ownership in it or his rights as a lessee of it, but also has the right to mine it and remove it regardless of the effect upon the surface under the terms of the grant or instrument under which he holds, then there is no liability to the owner of the surface for damages caused by the taking out of the coal, and he cannot be restrained at the suit of the surface owner from taking out all of the coal, including pillars.

Applying these principles to the City of Scranton particularly we can only say that in some cases the mine owners have the absolute right as between them and the owner of the surface to take out all of the coal regardless of the effect upon the surface, while in other instances they have no such right and they are bound to support the surface. While we have not undertaken to examine the title of all the large coal tracts in the city, yet, we are able to state as a matter of common knowledge that in very many instances the right of surface support has been parted with, so that as between the respective parties there is no liability on account of damages to surface caused by the mining out of coal.

While you have not asked us for an opinion upon this subject relative to the private rights of the property owners, yet we state these general principles which apply to them, for the reason that the rights and obligations of individual property owners toward the public are always more or less affected by their private property rights.

With reference to the right of subjacent support to the several streets and highways of the City of Scranton we can see no difficulty. Where the title to the roadbed is in the state, or the municipality, the title to the minerals therein or thereunder is likewise in the state, or the municipality. This is a general principle. But if the public only have the right of passage, and the title to the land subject to this right of passage is in a private owner, the property to the minerals is in such private land owner, subject however, to the obligation not

to interfere with the rights of the public. This principle is applicable also to private ways. The owner of the right of way has no property in the soil or the minerals thereunder, but he has the right of way thereover, which cannot be interfered with by the owner of the minerals.

In this city the great majority of the public streets and alleys were dedicated to the public use by the original landowners, who held title to large tracts of land within the city limits. For example, originally the Lackawanna Iron and Coal Company owned a very large tract of land in the Central city, which it caused to be plotted out into streets and alleys and building lots. By so doing it dedicated that part of its lands shown upon its plot as streets or alleys, to public use, and upon the acceptance by the municipality, either directly or by implication, the general public acquired an easement over the same, or a right to use such lands as and for public highways. The Lackawanna Iron and Coal Company did not thereby part with its title to the minerals underneath such streets or alleys, but in dedicating the same to the public it deprived itself of any and all right to mine out the subjacent coal or minerals in such a way as to cause damage to the highways. It or its grantees may remove the coal underneath the streets, but only upon leaving a sufficient quantity of it to support them, or by providing artificial support which will serve the same purpose. In other words, it may enjoy its ownership of the minerals in any way it may see fit, provided that it does no injury to the public easement. Or as was said by Mr. Chief Justice Lewis in *Woodring vs. Forks Township*, 28 Pa. 355, "A man who owns the soil on which the public have a highway has a right to enjoy his property in every way that may promote his interest or convenience so that he takes care not to injure the public easement."

The case of *Little Schuylkill Navigation Railroad and Coal Company vs. Tamaqua*, 1 Walker 468, is one directly in point. It was a case in which the Borough of Tamaqua brought suit against the company to recover the cost of repairing a bridge which was damaged by the caving in of the road on account of the mining operations of the defendant. The plaintiff recovered in the Court below and the judgment was affirmed by the Supreme Court on appeal.

This is the only case that we have been able to find which is directly in point, although there are a number of cases which sustain the general principle. Most of them arise in controversies between rail-road companies, whose rights of way have been injured by mining operations in the subjacent coal veins and the owners of the underlying coal. It would serve no purpose to quote these cases *in extenso*, and it is sufficient to say that the general principle is recognized that the ownership of the right of way carries with it the right to enjoy the same without damage or injury resulting from any use that the owner of the subjacent estate may make of his property.

We have not been able to find any authority upon the question of liability to private individuals who may suffer personal injury as the result of the removal of surface support. We have particularly in mind in this connection injuries which might result to persons assembled for public worship in a church, school children attending school, persons attending places of entertainment, or other large gatherings. As far as we have been able to ascertain there are no such cases reported in the books. We can, therefore, but give our individual opinions upon this question, which is: That whenever a mine operator knowingly mines out the support which is reasonably necessary to maintain the surface without notice or warning of any kind to the persons liable to be injuriously affected thereby in their persons, such mine operator would thereby become liable to respond in damages for such injuries, even though as between the mine operator and the surface owner the right of surface support had been distinctly waived. In our judgment, when such a case shall be presented to the courts the question will be so determined. Upon general principles it would seem that whenever the mine operator knowingly by his mine operations causes a surface subsidence, without giving notice or warning to the persons liable to be injuriously affected thereby, such mine operator would be guilty of a tort for which he could be compelled to respond in damages.

Finally, the question is, is there any remedy which can be invoked to prevent the welfare of the City of Scranton from being further injured or seriously prejudiced by the mining out of pillars which are necessary to support the surface, particularly in the thickly inhabited and built up portions of the city. This necessarily leads to a discus-

sion of the police power of the state and to what extent it has been delegated to the city.

The term police power is a very comprehensive one and one next to impossible to describe by a specific definition. In the case of *Lawton vs. Steele*, 152 U. S. 133, Mr. Justice Brown said:

"The extent and limits of what is known as police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars and habitual drunkards; the suppression of obscene publications and houses of ill-fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what the measures are necessary for the protection of such interests, *Barbier vs. Connolly*, 113 U. S. 27; *Kidd vs. Pearson*, 128 U. S. 1. To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the general public, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

IN FREUND OF POLICE POWER, Page 3 et seq. we find considerable enlightenment as to the meaning of the term.

"From the mass of decisions, in which the nature of the power has been discussed and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. It will be necessary to offer a few general observations upon these two points, bearing in mind that it is not by general statements, but only by a detailed examination of statutes and decisions that the power can be fully understood and defined. Such an examination will show what has been done and what has been approved by experience, what has been attempted and has failed, what has been surrendered, and what is aimed at and in process of being accomplished. It will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e. capable of development."

"The care of the public welfare, or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively, with a view of bringing about 'the greatest good of the greatest number.' The organized activity of the community is based upon the fact or belief that certain conditions essential or favorable to all alike cannot be obtained at all or without great waste and difficulty by private effort, and also that in certain respects individual activity is anti-social i. e. accomplishes its ends by sacrificing the interests of the case or of great portions of the community. The state supplies the former defect by collective communal action, and meets the latter by restraint and compulsion exercised over individuals."

"In so far as the prosperity of the community rests upon the efforts which each individual makes for himself, and in so far as without security of rights, free, fair and peaceful individual activity is impossible, justice is one of the chief elements of public welfare. * * * * Custom and a sense of propriety demand of the individual that he subordinate and adapt the exercise of his rights to manifest social interests and requirements and the disregard of this obligation appears as a wrong. Thus most of the self-evident limitations upon liberty and property in the interest of business, safety, health, order and morals are punishable at common law as nuisances. It is with reference to these obvious restraints that the maxim has been proclaimed: *sic utere tuo ut alienum non laedas*." (So to use your own as not to injure another).

"But no community confines its care of the public welfare to the enforcement of the principles of common law. The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory power for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or his rights of property as may be required to remove or reduce the danger of the abuse of those rights on the part of those who are unskilful, careless or unscrupulous."

These quotations are sufficient to give an intelligent idea in a general way of what is meant by the term police power.

In the 43rd section of Article 19, of the Act of 7th March, 1901, P. L. 20, it is provided that cities of the second class, of which Scranton is one, shall have power:

"To make all such ordinances, by-laws, rules and regulations, not inconsistent with the constitution and laws of this commonwealth, as may be expedient or necessary in addition to the special powers in this section granted for the proper management, care and control of the city and its finances and the maintenance of the peace, good government and welfare of the city, and its trade, commerce and manufactures, and the same to alter, modify and repeal at pleasure."

This is what is commonly called the general welfare clause and it would seem to be sufficiently comprehensive to justify the city councils in passing an ordinance forbidding the mining out of pillars in such a way as to endanger the surface in the thickly populated and built up portions of the city.

This would unquestionably be so were it not for another principle which is firmly established by fundamental law, viz.: that private property shall not be taken for public use without compensation to the owner thereof. If the city authorities should pass an ordinance such as above referred to and proceedings were instituted to enforce its provisions, the argument might be made on behalf of the coal owners that to deprive them of their right to mine the coal in accordance with their private contractual rights would be to

deprive them of their private property for the benefit of the public, without compensation. This is a question which would have to be determined by the courts, and we are not prepared to state that such an objection on the part of the owner of the coal would not be tenable. It has been held in many jurisdictions that private property cannot be taken for public use under the guise of the police power, unless under extraordinary circumstances. It may be that such an objection would be held untenable, if it should appear that the violation of such an ordinance would result in such a condition of things as would produce a public calamity. It would certainly raise a most interesting legal question for determination by the courts, and one which we do not feel justified in expressing any positive opinion upon in the absence of any adjudicated cases bearing directly upon it.

If the court should fail to uphold such a city ordinance then we would have no remedy under the police power enforceable by the municipality, and resort would have to be had to the state legislature. We have no hesitation, however, in expressing the opinion that the state has ample power to provide a remedy by legislation. In just what form such legislation should be enacted is a question upon which opinions may differ. It is certainly one which should require the fullest consideration on the part of those who may be skilled upon this particular branch of the law.

It seems clear to us that the state would have the power to provide the machinery by legislation for the condemnation of coal, and to provide for compensation to be made to the owners thereof out of the state treasury. The police power is first vested in the state and the power of eminent domain, likewise. If such legislation should be passed and provision was made for compensation then no question could be raised as to the authority to appropriate private property for the public use or for the public welfare without compensation.

The state by proper legislation could give to the several municipalities under the power of eminent domain the right to seize and condemn coal which might be necessary for surface support, together with the right to appropriate moneys to compensate the owner for the loss of such coal. While such legislation would be in our judgment valid and constitutional, it would entail an enormous expense to the taxpayers of the city and might therefore prove impracticable,

because of the great value which might be put on the minerals by the owners thereof, in case their private right to mine and market them should be taken away. What such expense would amount to is a matter beyond our powers of estimation or computation. The just and equitable remedy in view of all of the circumstances would be the first one suggested, viz.: condemnation of such coal lands by the state and compensation out of the public funds of the commonwealth.

It is unnecessary for us in this opinion to describe the process by which compensation could be secured by the coal owners in any given case. The proceedings would be analagous to those that are taken whenever under existing laws private property is taken for public use, such as in the widening of a street, the changing the grade thereof, etc. Nor do we intend to be understood as expressing the opinion that compensation must be provided for in order to prevent the mining out of pillars under the populous parts of the city. As above stated this is a question which the courts have not yet passed upon.

The general principles are well settled but the difficulty, if any, will be in applying them to this specific question. Mr. Justice Agnew, in *Philadelphia vs. Scott*, 81 Pa. 80, clearly defines the difference between police power and eminent domain in the following language:

"The argument in this case took an extended range of discussion upon the powers of the state, of eminent domain and police. In their leading features these powers are plainly different, the latter reaching even to destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in the case of a nuisance tending to breed diseases. In the first instance, the community proceeds on the ground of overwhelming calamity; and in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based upon disaster, fault or inevitable necessity. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, but in public utility."

Applying this distinction and the general principles as thus expressed by Mr. Justice Agnew it follows that if it could be shown to the court as a matter of fact that the mining out of pillars ordinarily left for surface support would tend to bring on a public catastrophe, or would result in public calamity, the court would hold that the owner of the pillars might be prevented from so mining and removing them under the police power of the state and without compensation.

(NOTE. The above opinion was written by Ex-Judge John P. Kelly and Milton W. Lowry, Esq., for the Scranton Board of Trade.—Editor.)

Under the laws of Pennsylvania, the legal identity of husband and wife is held, in *State vs. Shaw* (Kan.) 100 Pac. 78, 21 L.R.A. (N.S.) 27, not to prevent a husband who burns his wife's house from being guilty of arson.

The lessor of offices in a building to one whose business requires the visits of patrons, who covenants to keep the elevators in repair and operation, is held, in *McCall vs. New York L. Ins. Co.* 201 Mass. 223, 87 N. E. 582, 21 L. R. A. (N. S.) 38, to be guilty of eviction, if he diverts the power necessary to operate the elevators to other uses, so that the elevator service is rendered defective, and the premises practically unfitted for the transaction of the business for which they are hired.

The playing of baseball on Sunday is held, in *State vs. Prather* (Kan.) 100 Pac. 57, 21 L.R.A. (N.S.) 23, not to be prohibited by a statute which provides that "every person who shall be convicted of horse racing, cock fighting, or playing at cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding \$50."

A license tax on a four-horse wagon used for hauling freight for hire, which is nearly three times as much as that imposed on three-horse wagons, is held, in *Fiscal Ct. vs. F. & A. Cox Co.* (Ky.) 117 S. W. 296, 21 L.R.A. (N.S.) 83, to be void for discrimination.

In the Court of Common Pleas of Lackawanna County.

No. 1 November Term, 1908.

In Equity.

Conclusions of Trial Judge and Decree Nisi.

Alex Mazaika, et al. vs. Andrew Krauczunas, et al.

Legal Title of Church Property—Lay Trustees—Power to Select Trustee of Legal Title—Qualified Electors of the Congregation.

Respective Jurisdiction of Civil and Ecclesiastical Courts.

In a religious congregation a question is raised as to who should have the right to hold the legal title to certain real estate purchased for the congregation by moneys contributed by its members. The parties plaintiff and defendant, after setting forth the qualifications which would entitle the members of the congregation to vote, agree to an election at bar and that the entire question of the choice of a trustee or trustees, for the purpose of the suit at issue, be determined *de novo* by an individual examination and vote of the adult male members of the congregation in good standing, in accordance with the rules and regulations of their church.

Held: That this action of the parties to the suit is valid and binding, and the adult lay members of the congregation in good standing have the power to select as trustee to hold the legal title for the congregation either a lay member or members, or such an ecclesiastic as may be designated by the rules of that particular church.

In such a case it is not necessary that an absolute majority of all of the adult male members of the congregation vote for the selection of a trustee. A majority vote of all the qualified electors voting is sufficient for a choice, as it is presumed either that all legal electors voted, or, if they did not, that they acquiesced in the action of those who did vote.

The civil courts have no power to review the judgment of ecclesiastical courts in matters within their jurisdiction.

The cases of *Craig vs. Church*, 88 Pa., 42, and *Schlitcher vs. Keiter*, 156 Pa., cited and distinguished.

Messrs. T. P. Hoban and John P. Kelly, for plaintiffs.

Messrs. A. A. Vosburg and W. J. Hand, for defendants.

Opinion by E. C. Newcomb, A. L. J., November 19, 1909.

The plaintiffs sue for themselves and all other members in good standing of the religious congregation, hereinafter mentioned, who may choose to become parties. The subject matter of the suit is the disposition by the congregation of the legal title to its property. The specific relief asked for is that defendants be required to transfer the title to Rt. Rev. Michael J. Hoban, Bishop of Scranton, as trustee for the congregation. This, it is averred, is to enforce the action of the congregation in the exercise of its right of choice in the matter.

Such action is alleged to have been taken June 8, 1908, by a majority of its adult male members at a meeting regularly convened for that purpose. The truth of this averment was challenged by the answer and the validity of the election denied. This appears to raise the only essential question of fact in dispute. Issue was formally joined and the parties went to trial March 9th, this year. In the course of two or three days it became apparent that if the question was to be determined by review of the action taken at that meeting the result would be unsatisfactory and doubtful. That led to a new election at bar by agreement of parties, but for that purpose continuance was had to a later date. In the meantime the parties did what they could to ascertain who were entitled to vote. The voting began July 9th and continued several days. Argument was heard October 22d.

From the pleadings, evidence and arguments of counsel I find the following:

CONCLUSIONS OF FACT

The property in question consists of three contiguous lots at the northwesterly intersection of North Main Avenue and Theodore Street, in this city, designated as eleven, twelve thirteen according to a map or plot of lots known as "Electric City Park", which is recorded in the proper office of this county. They are the same lots conveyed by Bishop Hoban to the defendants, as trustees, etc., by deed dated May 29, 1908, and are particularly described in the fourth paragraph of the bill. They are improved with a church edifice, built in 1893.

2. As so improved the property has from that time ever since been in the actual use and enjoyment of St. Joseph's Lithuanian Catholic Congregation of Scranton—except as hereinafter stated—as a place of religious worship in accordance with the purposes of its organization.

3. The Congregation was organized about 1891 or 1892 as an unincorporated religious association for the support of public worship according to the laws, usages, faith, doctrine and discipline of the Catholic Church. For that purpose the property was acquired and paid for with funds furnished and contributed by the members. It is not disputed that the beneficial ownership is in the Congregation and that

at all times since the purchase the legal title has been held by some person or persons in trust for its uses as such Congregation.

4. The Congregation has at all times been subject to the ecclesiastical jurisdiction of the Catholic Bishop of the diocese of Scranton, and under the pastoral charge of a priest appointed to it by him, although during the pendency of this suit the use of the property for church purposes has been prohibited by Rt. Rev. Michael J. Hoban, who has been bishop of the diocese since 1899.

5. The trustees who have held the legal title have at all times been certain of the lay members of the Congregation. In late years it has been held by the ten defendants. That was objectionable to the Bishop as contrary to the prevailing rule of the Church on the subject, and eventually brought on a factional controversy among the members. Litigation began in 1906 over a conveyance of the title which had that year been made to the Bishop in pursuance of certain action had at a meeting of the Congregation. The validity of the transfer was successfully attacked by the faction supporting the ten lay trustees. The nature of that controversy and its result appear by official report of the case in 221 Pa., at page 213. It terminated in the reconveyance by the Bishop to the defendants mentioned in the first conclusion *supra*.

6. The outcome of that transfer was the congregational meeting of June 8th, last year,—an attempt, no doubt, by the faction supporting the Bishop to have the title put in his name in conformity with the statute governing the selection of an ecclesiastical trustee in such cases.

7. Hence, by common consent, the question submitted to each voter at the proceedings hereinafter mentioned, was: "For whom do you vote; the bishop or the ten trustees?"

8. March 11th, this year, during the progress of trial the effort to review the action of the Congregation in the premises was mutually waived, and as a means of ascertaining the choice of the members it was agreed that a new election be held at bar, in manner following:

"It is agreed that the testimony of all witnesses heretofore taken by the plaintiffs, except that of Rev. M. J. Hoban and Rev. J. W. Malone, may be stricken out and that the entire question of the choice

of trustees or trustee by St. Joseph's Lithuanian Catholic Congregation for the purposes of this law suit shall be determined *de novo* by individual examination and vote of the members of the said congregation, conducted by the chancellor or by a master appointed by the chancellor, it being agreed that the votes of those who were members of the congregation on June 1, 1908, and who had contributed to the support of the church and had performed their Easter duty at any time between March 1, 1904, and June 1, 1908, shall be entitled to vote.

"Further hearing is continued until Monday, the 22nd day of March, 1909, on or before which date it is agreed that the voting list of membership is to be prepared and a copy thereof to be submitted to the court."

9. June 30th it was further agreed as follows:

"The counsel for the parties state that they have agreed upon a certain number of voters, and these names appear in lists which are held by both parties, upwards of a thousand names.

"On the list prepared by the defendants there appear somewhat less than 400 names, about 390, which do not appear upon the plaintiffs'; and there appear on the plaintiffs' list and do not appear on the defendants' list about 700 names.

"It is agreed between counsel that there be added to the list of names the voters already agreed to the names of those not already included in said list who appear upon the printed list of voters contributing to the support of the church in 1906, 1907 and 1908, as well as the names of members who contributed to the support of the church in 1904, 1905 and 1906 appearing upon the congregation record book kept by the secretaries of the congregation during said years, reserving to each side the right to challenge any of the parties whose names are so added, to examine them and adduce proofs as to their qualifications before their votes are cast; the presence of their names upon the list of voters to be *prima facie* evidence of their right to vote.

"This agreement is intended to justify or authorize the adding to the common list, first, the list of names furnished by the plaintiffs; and, second, the list of names furnished by the defendants which names do not appear upon the common list; that of the plaintiffs being marked Plaintiffs' Exhibit No. 2, June 30, 1909, H. H. C., C. S., and

that of the defendants being marked Defendants' Exhibit No. 2, June 30, 1909, H. H. C., C. S."

10. The several lists are marked as follows: Common list, "B. B."; plaintiffs' additional, "No. 2"; defendants' additional, "A. A." All three are thus made part of the record and may be referred to for their contents. They are too voluminous to be incorporated here. In the foregoing order they number 1,244, 839 and 480 names respectively. It is thus apparent that at the outset there was an assumed membership of 2,563 *prima facie* qualified to vote. That was only a working assumption however. Neither side knew or had any adequate means of ascertaining the number of male members qualified to vote. It was freely admitted that the voting membership is indefinite in number. The figures stated are subject to the qualification that as between the different lists there were some duplications. There was no attempt to restrict the voting to those named in the lists, where persons claiming the right to vote were prepared to prove it. The agreement as to the lists was treated as putting upon all persons not therein named the burden of affirmative proof. Therefore, while many of those listed did not appear, it is equally true that others who were on neither list did appear and qualify. Except in two or three instances there was nothing to account for the absence of those on the lists who did not appear. There was nothing to show whether they were living or dead, or, if living, whether they have a residence here or have moved elsewhere, except so far as might be technically implied by the nature of the lists themselves.

11. The voting began the 9th and proceeded from day to day until the 19th of July, without question that full opportunity was afforded to all members who desired to vote. The total of the votes cast was twelve hundred and forty (1240). Of these, six hundred and fifty-seven (657) were for Bishop Hoban, and five hundred and eighty-three (583) for the present trustees. There were eighty-six (86) challenges, each side having the same number, after defendants had withdrawn one of theirs. In some instances the challenge was disposed of at the time; in others the vote was taken subject to the challenge to be further considered. Eliminating those which were ruled in favor of the defendants the number of disputed votes is not

enough to effect the apparent result, and at the argument they were not pressed for consideration. Therefore, a majority of the male members of the congregation of the age of twenty-one years who saw fit to exercise their right at the time and place agreed upon by the parties, voted in favor of Rt. Rev. Michael J. Hoban, Bishop of Scranton, as trustee to hold the legal title in question.

CONCLUSION OF LAW.

1. The ownership of the property in controversy being in the Congregation, it is at all times subject to the control of its lay members of voting age, and they may by due and concurrent action of the majority select at pleasure a trustee in whom to put the legal title.

2. There is no evidence in the case, or available to the parties, by which the number of such members can be ascertained.

3. Under the facts found, the disputed votes are not material to any question involved in the case and may be disregarded.

4. A majority of the undisputed votes having been cast in favor of the Bishop, that is decisive of the issue agreed upon.

5. The plaintiffs are entitled to the relief prayed for and a decree should be entered requiring defendants to transfer the legal title in question, by their proper deed duly executed, acknowledged and delivered, to Rt. Rev. Michael J. Hoban, Bishop, of Scranton, as trustee for St. Joseph's Lithuanian Catholic Congregation of Scranton.

6. The nature of the case is such that each party should pay their own costs, except the interpreter's fees, which should be paid by the parties in equal shares.

The requests for specific conclusions are disposed of as follows:

PLAINTIFFS' REQUESTS FOR CONCLUSIONS OF FACTS.

4. That Andrew Krauczunas and the other defendants were, on December 16, 1906, excommunicated from the Catholic Church by Rt. Rev. Michael J. Hoban, Bishop of the Catholic Diocese of Scranton, in accordance with the laws of said Church.

Answer. This is believed to be a mixed question of law and fact. As such it might perhaps be properly answered here if it

were material to the issue. I consider it quite immaterial and therefore decline to answer it either way.

The other four requests for findings of fact are covered by my general conclusions and may therefore be omitted as useless repetition.

PLAINTFFS' REQUESTS FOR CONCLUSIONS OF LAW.

The same is true of these and they need not, therefore, be further answered.

DEFENDANTS' REQUESTS FOR CONCLUSION OF FACTS.

The first and second are substantially so found in my general conclusions.

3. Within a few days after the delivery of the deed to the defendants herein as trustees, by the said Right Rev. Michael J. Hoban, in accordance with the decree of this court the said Right Rev. Michael J. Hoban prepared and published a so-called interdict, forbidding under penalty of excommunication any Catholic priest from officiating or conducting religious worship of any kind in the church building of the said Congregation, located upon the property in question, so long as the Congregation maintained its right to choose its own lay trustees to hold the title of this property under the laws of this commonwealth, and refused to convey the property under the laws of the Roman Catholic Church. The said interdict being as follows:

Answer: This is incomplete for want of a copy of the order referred to. That an order prohibiting the use of the property for church purposes was issued by the Bishop is stated in my fourth conclusion. A more explicit answer is declined because the terms of the order are quite immaterial in view of the agreement to hold a new election.

4. By reason of the said interdict all religious worship and services in the said church building have been suspended, and the Congregation has been deprived of the right and privilege to the use of its own church property for religious services, the priest who had heretofore been in charge of the services having refused to conduct the same by reason of the interdict of the said Bishop Hoban.

Answer. It is so founded; but beyond the mere fact that worship at that place has been suspended it is believed to be immaterial.

5. After the commencement of the proceedings at No. 2 January Term, 1907, in equity, by the defendants in behalf of the said Congregation, to compel the conveyance of the title to them as trustees for the said Congregation, which proceedings were brought by express direction of the said Congregation, said Right Rev. Michael J. Hoban, Bishop of the Catholic Diocese of Scranton, excommunicated the defendants herein, who were plaintiffs in the said proceedings, in pursuance of his notice to them that he would so excommunicate them unless they withdrew the said proceedings.

Answer. It is so found, but the facts are believed to be immaterial.

6. The decrees of the Catholic Church require that all church property shall belong to the Bishop or Ordinary of the Diocese, and subject to his control alone, and forbid the lay members of congregations from interfering or intermeddling with the control of the same.

Answer. If it is meant that the legal title is required be so held, the fact is founded as requested.

7. The property in question in these proceedings was purchased by St. Joseph's Lithuanian Catholic Congregation in 1893, and the title to the same was taken by deed in the name of five lay trustees, members of the congregation.

Answer. It is so found.

DEFENDANTS' REQUESTS FOR CONCLUSIONS OF LAW.

1. The law of this commonwealth requires that the property of any church, congregation or religious society for religious worship or sepulture, or the maintenance of either, shall be subject to the control of the lay members thereof, or its officers or representatives, the majority of which shall be lay members and citizens of Pennsylvania.

Answer. Affirmed.

2. The rule and regulations of the Roman Catholic Church are inconsistent and in conflict with the laws of this Commonwealth regulating the control and disposition of church property.

Answer. Affirmed.—but how it is material under the issue here is not apparent.

3. The bill filed in these proceedings shows that it is an attempt to procure the conveyance of the title of the property in question to Right Rev. Michael J. Hoban, Bishop of the Catholic Diocese of Scranton, to be held by him in accordance with the laws, rules and usages of the Catholic Church, which are in conflict with laws of this Commonwealth.

Answer. As this is understood it is refused.

4. Before the court can decree the conveyance of the property of an unincorporated church, congregation or religious society to any ecclesiastic or person other than a layman, it must be clearly and definitely shown by competent evidence and due proof, that the majority of the male members of lawful age of such body, have consented to the choice of such ecclesiastic as their trustee, and until this fact definitely appears the court has no jurisdiction to make such a decree.

Answer. This is answered the same way.

5. Under the testimony in this case, the plaintiffs have failed to show by due proof as required by law, that the majority of the adult male members of lawful age of the St. Joseph's Lithuanian Catholic Congregation of the City of Scranton have chosen Right Rev. Michael J. Hoban, Bishop of the Catholic Diocese of Scranton, for their trustee.

Answer. They have failed to show affirmatively that those voting for a change of trustee constitute a majority of those entitled to vote. To that extent the request is affirmed. If more is intended, it is not affirmed.

6. The evidence shows an admission by the plaintiffs that on June 1, 1908, there were over two thousand members of St. Joseph's Lithuanian Catholic Congregation who were entitled to vote upon the question of election of a trustee, and in order to give the court jurisdiction to decree a conveyance of the said property to Right Rev. Michael J. Hoban, Bishop of the Catholic Diocese of Scranton, as trustee, it was incumbent upon the plaintiffs to show the consent of more than one thousand of such members to the election of the said Michael J. Hoban as trustee.

Answer. Refused.

7. The publication of the so-called interdict against the said Congregation and its property by Right Rev. Michael J. Hoban, Bishop of the Catholic Diocese of Scranton, was in effect an attempt to nullify and destroy the effect of the decree of this court entered at No. 2 January Term, 1907, in equity, confirming the right of the said Congregation to control its own property and choose its own lay trustees to hold the legal title thereof.

Answer. Refused.

8. The action of the Right Rev. Michael J. Hoban in publishing the so-called interdict against the said Congregation and its property, and forbidding any Catholic priest to conduct any religious exercises in the said church property, has the effect of making St. Joseph's Lithuanian Catholic Congregation an independent Catholic church with the right to choose a pastor to conduct worship in their said church in accordance with the faith and rights of the Roman Catholic Church, otherwise the said Congregation will be deprived of the right to the use and enjoyment of its said property for the purposes of religious worship and will be denied the protection of the laws of this Commonwealth.

Answer. Refused.

9. Under all the evidence in the case the plaintiffs' bill must be dismissed.

Answer. Refused.

10. The plaintiffs should be ordered to pay the costs of this proceeding.

Answer. Refused.

DISCUSSION.

According to my conception of the case it is immaterial whether it be regarded as a contest between the two factions of the congregation or between one faction and the present trustees. In either case it would be competent for the parties to agree upon any lawful means that would fairly test the wishes of the congregation. The means adopted were well suited to the purpose. When the agreement was made I ventured to think the controversy was reduced to a very simple question. I remain of that opinion after having given a

good deal of attention to some apparently irrelevant questions, the consideration of which the learned counsel have seen fit to press.

Both sides have formally asked for a finding that before the inception of the suit defendants were excommunicated from the Church by the Bishop. Plaintiffs' request varies from that of defendants in that it asks the finding that the decree was in the form of law. It has been found in form as requested by defendants, though I am at a loss to understand its object. Certainly it can serve no practical purpose in this case. The only right which possibly could have been affected by the finding was the right to vote; for that is the extent of the defendants' interest in the suit. They have, if anything, the same interests as other male members of the Congregation of voting age. If in good standing they may vote; nothing more. But that was conceded. They voted without objection.

While I have found the fact that they were excommunicated as they have requested, I am unwilling to go farther and to say whether it was lawful or not. That is for the tribunals of the Church. I don't understand that we have power to review the judgment of an ecclesiastical court in matters within its jurisdiction.

The defendants also ask for rulings to the effect that certain regulations of the Church, touching title to the property of its congregations, conflict with the laws of the Commonwealth; that the interdict suspending religious worship was an attempt to nullify a former decree of the court; and that it operated to put the Congregation with its property outside the Episcopal control of the Church and thus left them free to choose their own pastor as an independent congregation, as otherwise they are deprived of the free use of their property.

It is true there is an apparent conflict between the requirements of the Church and the law of the land regarding the title to property belonging to religious associations. But that can only be involved where there is an attempt to enforce compliance with the Church regulation, against the will of the congregation. If it be their wish to select as trustee the ecclesiastic designated by the rules of the Church they may do so, because the law says so. Therefore, if the wish of the congregation has been expressed here, all questions of conflict as between the policy of the Church and that of the Com-

monwealth, as well as of an attempt to evade the law or nullify the decree of court, become irrelevant. In the case where the decree referred to was made, the supreme court in defining the status of the then trustee make that very plain. It was said: "The defendant is trustee of the legal title to the property for the exclusive use of the congregation, without any interest therein or any right or power to control its use or disposition; the congregation has the right to substitute other trustees in his stead, and having done so by a majority vote at a regularly called meeting for that purpose, it is entitled to the process of the court to compel a conveyance from the defendant to the trustee of its own selection." *Krauczunas vs. Hoban*, 221 Pa., 213.

As to the supposed status of independence arising by operation of the interdict, it is enough, to say that no question of ecclesiastical identity is involved in the case. That is so because, (1), the defendants are precluded from raising it by the nature of their trust; (2), in their answer they avowed the identity of the congregation as being subject to the authority of the Catholic church; (3), they admitted its identity by joining in the submission of the dispute to a vote of its members.

Hence the sole question is whether the action of the majority at bar evinces the consent of the majority of the voting membership, within the meaning of the act of June 2, 1887, P. L. 298, amending that of April 26, 1855, P. L. 328. There can be no question that the effect of this legislation is to confirm the congregation in the ownership and management of its property, independently of any control of the Bishop, subject, however, to their right to put the naked title in him as trustee by consent of the majority of the male members of voting age. It is urged by the learned counsel that this provision is in the nature of an exception to a general rule and is, therefore, to be strictly construed. That may be so; and under other circumstances this reasoning might demand consideration. It is enough, however, in any case to say that the fact of consent being once ascertained there would remain no room for argument as to the proper rule of statutory construction. Here the parties by agreement adopted their own method of ascertaining the fact. In that way "due proof of such consent" has been obtained according to a

test satisfactory to the defendants. They stipulated "that the entire question of choice of trustee or trustees of St. Joseph's Lithuanian Catholic Congregation for the purposes of this suit shall be determined *de novo* by individual examination and vote of the members of said Congregation conducted by the chancellor," etc. To this was added a clause for the purpose of restricting the franchise to those who had been in good standing within the period of four years next prior to the interdict.

It must be presumed that this test was intended to be applied according to the prevailing rule which governs the action of all electorates composed of an indefinite number of voters. If not so intended I would be unable to tell what it does mean. The general rule with regard to civil elections has been stated as follows: When the law requires for the election of an officer or carrying a measure, a vote of a majority, or other specified proportion of the qualified voters, it is generally considered sufficient if the required proportion of the votes actually cast is in favor of the candidate or measure, and there is no necessity for any inquiry as to the actual number of voters in the district; for it is presumed that all legal electors voted, or, if they did not, that they acquiesced in the action of those who did. 10 A. & E. Enc. L., (2d Ed.) 754; Com. vs. Read, 2 Ash., 261.

As between a corporate act to be done by a definite number of persons, and one to be performed by an indefinite number, a distinction is to be noted. In the former case nothing can be done unless a majority of the whole body are present; in the latter a majority of those present may act: Craig vs. Church, 88 Pa., 42. See also Schlichter vs. Keiter, 156 Pa., 119.

To my mind the case is governed by the application of these principles to the action taken by the members in pursuance of the agreement of parties. As such it is free from either doubt or difficulty.

Let a decree *nisi* be entered in accordance with the fifth and sixth general conclusions of law; exceptions, if any, to be filed within ten days after notice *sec. reg.*

A conviction depending mainly on testimony of an accomplice is held, in Hill vs. State (Tex. Crim. App.) 117 S. W. 134, 21 L.R.A. (N.S.) 878, not to be sustainable if the accomplice also swore that his testimony was false.

A person whose name does not appear upon a promissory note is held, in *New York L. Ins. Co. vs. Martindale*, 75 Kan. 142, 88 Pac. 559, 121 Am. St. Rep. 362, 21 L.R.A. (N.S.) 1045, not to be chargeable as an indorser thereof, by parol proof that the nominal payee, in accepting and indorsing it, was acting as his authorized agent, where nothing upon the face of the note suggests the existence of an agency.

When a corporation owning realty sells it through A, its president, to B, and notes for the purchase money are signed "B, trustee," which are payable to "A, president," and the latter, in the name and behalf of the corporation, makes a deed of the property to "B, trustee," who, without the knowledge of the corporation, makes the purchase for himself and others, and the possession, use, and benefit of the property goes to those for whom he thus purchases, it is held, in *Coaling Coal & Coke Co. vs. Howard*, 130 Ga. 807, 61 S. E. 987, 21 L.R.A. (N.S.) 1051, that the notes not being under seal, though negotiable, the corporation may maintain a suit outside of the notes on the original consideration for the purchase price, against B and the undisclosed principals for whom he acted in making the purchase. An extensive note to these cases in L.R.A. collates all the authorities on the liability of a principal on negotiable paper executed by an agent.

A contract by a municipal corporation, not itself under obligation to furnish fire protection to its inhabitants, for a supply of water to be furnished by a water company for such protection, is held, in *Annum vs. Camden Water, Light, & Ice Co.* (S. C.) 64 S. E. 151, 21 L. R. A. (N. S.) 1029, not to give a right of action to an individual injured by negligent failure to perform the contract, if the contract contains no express stipulation imposing such liability, and the compensation provided is not sufficient to recompense the company for such risk, while the contract itself provides that failure to perform its duties shall subject the water company to forfeiture of its franchise and of \$10 per month for each hydrant not kept supplied with water.

In the Court of Common Pleas of Lackawanna County.

No. 501 January Term, 1908.

Raymond Dymond vs. Rae Dymond.

RULE FOR NEW TRIAL.

Divorce—Charge of the Court—Instructions to Jury—New Trial.

A, a husband, sues B, his wife, for divorce, alleging adultery and cruel and barbarous treatment; certain witnesses at the trial testify as to the charge of adultery, and, on motion of Attorney for the respondent, the Court in its charge fully and specifically instructs the jury to disregard this particular testimony and to consider the case as if no such testimony had been offered. The jury returns a verdict in favor of the libellant on the other charges.

Held:—That the charge of the Court sufficiently protects the rights of the Respondent, and verdict of the jury will not be set aside.

In such a case evidence that respondent entertained in her husband's home her friends, who were strangers to him, against his protest is properly admitted under the allegations of cruel and barbarous treatment where the Court instructs the jury that they might consider whether the men were brought there maliciously by the wife to inflict upon the husband a sense of pain and degradation.

Mr. Clarence Balentine for libellant.

Mr. George D. Taylor for respondent.

Opinion by E. C. Newcomb, A. L. J. November 8, 1909.

It is contended, first, that the court ought in its discretion to direct a retrial of this case because the defendant must be assumed to have been prejudiced by the evidence of certain witnesses in support of the charge of adultery. The evidence was stricken out on defendant's motion, it is true. This was followed by a motion to withdraw a juror on the same ground that a new trial is now asked. The record shows that the jury was carefully instructed to disregard the evidence and to treat the case as though these witnesses had not been called, and indeed as though no charge of adultery had ever been in the case. We fail to see how it would be practicable to say more than was said here to guard against the effect of evidence which had been formally stricken from the record. The argument is that while the evidence was properly disposed of in that way as not supporting the allegation, yet it went far enough to affect the defendant unfavorably and thus might well tend to deprive her of a fair and impartial consideration of her defense to the charge of cruel and barbarous

treatment. When it is considered how frequently in the trial of causes some part of the evidence is stricken out before its submission to the jury, it is manifest that there is no force in defendant's position in this regard unless it arises from some peculiar distinction to be made in her favor because of the nature of the issue or the evidence in question. There is nothing in reason or precedent to support such theory. It is freely admitted by the learned counsel that in cautioning the jury in the premises everything was said that could be asked for. In so far as setting a verdict aside is a matter of discretion, it must be done in the exercise of a sound and enlightened discretion. In this case it would have nothing to rest upon better than an arbitrary assumption that the jurors were either unwilling or unable to follow instructions admittedly open to no exception, on a point about which there could be no obscurity. Needless to say that cannot be done.

This leaves for consideration the question whether under the issue of cruel and barbarous treatment it was error to allow proof that respondent openly entertained her gentlemen friends at her husband's home against his protest. These visitors were strangers to him. On the last visit when they were requested to leave there was evidence that she defiantly bade them wait for her, and that when she had made herself ready she joined them and returned with them to Scranton in the face not only of the husband but of his friends and acquaintances. This was on Sunday and apparently brought the trouble to a climax. Three days later the libel was filed.

Their married life had been stormy. That the wife had a bad temper admits of no doubt. The verdict establishes the fact that she repeatedly committed violent assaults on the husband. The vital question was whether as a whole her conduct was malicious and amounted to a course of cruel and intolerable treatment. There were two ways of looking at the incidents in question. The jury was distinctly told that if one view were adopted they dropped out of the case and were not to be considered. But that they might be considered only in case it was found that these men were there at the wife's invitation, for the purpose of making a parade of her admirers before her husband and his acquaintances as a means of inflicting upon him a sense of pain and degradation. In that event it was held the

incidents would be evidence against her. On review of the case I am still of the opinion this was not erroneous. The element of malice is a material factor in such case. It would be no great stretch of the imagination to perceive a refinement of cruelty in conduct of either husband or wife involving no physical injury or menace thereof. But the point made here is that it was believed to be evidence to show a malicious and heartless disposition, if these strangers were invited there for the purpose alleged by the husband. I cannot see how it could be considered otherwise.

It is believed the case was for the jury and that it was fairly submitted. Considering the known reluctance of juries to find in favor of divorce, I cannot doubt that the defendant has had a fair trial. The rule to show cause is discharged.

The fact that the compensation paid under a contract between a municipal corporation and a water company for a water supply to extinguish fire is secured by taxation of the property holders of the municipality is held, in *Hone vs. Presque Isle Water Co. (Me.)* 71 Atl. 769, 21 L. R. A. (N. S.) 1021, not to give them a right to maintain an action against the water Company for loss of their property through its neglect to perform its contract.

A legatee in a will, who files an opposition to the probate of a codicil which cuts down his interest, and succeeds in having portions of the answer thereto stricken out, forcing a compromise with the chief beneficiary of the change made by the codicil, is held, in *Re Hite (Cal.)* 101 Pac. 443, 21 L. R. A. (N. S.) 953, to be within the meaning of a clause in the will, forfeiting the interest of one who contests it.

The driver of a delivery wagon, who, at his own risk, leaves goods without collecting the purchase price, is held, in *Steinman vs. Baltimore Antiseptic Steam Laundry Co.* 109 Md. 62, 71 Atl. 517, 21 L. R. A. (N. S.) 884, not to act for his employer in returning to the house, of his own accord, to collect the money, which is, in fact, his own, so as to render the latter responsible for a wrong committed by him while so doing.

In the Orphans' Court of Lackawanna County.

No. 345—1908.

In Re: The Estate of Helena Rode, a Minor.

Petition for the Appointment of a Gaurdian.

*Minors—Guardians.—Right of a minor over fourteen years
of age to select guardian.*

Where a guardian has been regularly appointed for a minor under fourteen years of age, and the minor, on arriving at the age of fourteen years, seeks upon due petition to exercise his right to select his own guardian, the Orphans' Court will not remove the former guardian, if the change would be probably to the prejudice of the minor.

In this respect the consideration to control and direct the discretion of the Orphans' Court is not the strict legal rights of the minor under the Act of Assembly requesting the appointment of a new guardian, or the unfitness of the old guardian, but the advantages resulting to the minor from the change. Jurisdiction of the Orphans' Court under the Act of March 29th, 1832, P. L. 190.

Mr. John F. Murphy, for petitioner.

Mr. W. A. Wilcox, contra.

Opinion by M. F. Sando, P. J., October 30, 1909.

The petitioner, is one of the four minor children of William Rode, and ——— Rode, his wife, both deceased. The mother died seven or eight years ago. The father re-married in 1902, and died on April 10, 1908. The Scranton Trust Company was appointed her guardian, and by her guardian she was placed in the custody and care of Kate Rode, her step-mother with whom she continues to reside. Her estate amounted to about eight hundred dollars; but it is less now by reason of expenditures made by her guardian amounting to \$78.32. Her petition states inter alia: the date of her birth as being August 13th, 1895, and, that she has no guardian to take care of her person and estate. At the hearing, an amendment to the petition was suggested, to state that the petitioner is now over fourteen years of age and desires to choose a new guardian. The matter was then proceeded with on the petition as amended and testimony.

The present application must therefore be regarded as the just attempt of the petitioner to exercise her right of selection, and necessarily involves the right of the minor to choose a new guardian, and the jurisdiction of this court.

We are not convinced that the application should be granted. For while it is true that the right of a minor to select a new guardian, after attaining the age of fourteen years, is not dependent upon the unfitness of the guardian previously appointed, the minor should not be permitted to exercise it where a change would probably be to her prejudice.

The Act of March 29, 1832, P. L. 190, by section 5, commits the care of the persons and estates of minors to the Orphans' Court of the county within which the minor resides, and that court has the "power to admit such minors, when and as often as there shall be occasion to make choice of guardians, and to appoint guardians, for such as they shall judge too young or otherwise incompetent to make choice for themselves."

The legal discretion thus vested in the court to confirm the nominee of the minor is not to be exercised arbitrarily, so as to compel the nomination of any certain person, but is limited to the decision of the question, whether there exist circumstances which would justify the court, conceding the right to choose, in restraining the exercise of this right.

The supervision of the Orphans' Court of the right of choice, is designed for the benefit of the minor, and not for the benefit of the guardian appointed before the minor became fourteen years of age.

As we understand the ruling in Lee's appeal, 27 Pa., 229, stated in the syllabus "Where the court appoints a guardian to an infant under the age of fourteen, the infant when he arrives at that age or afterwards, may appear in court and choose another guardian with the sanction of court;" and from a consideration of the facts in the present application, it does not appear that reasons are here shown for a change, or for the sanction of this court for the change.

In Gray's Appeal, 96 Pa., 243, Hawkins, P. J., in the court below held that, though the person named by the ward be unobjectionable, the mere transfer of the trust may be undesirable, and justify the court's refusal to make a change. Said he: "When the legislature gave the Orphans' Court of each county * * * * the care of the persons of minors resident within such county, and of their estate, and * * * * power to admit such minors when and as

often as there shall be occasion to make choice of guardians, it gave in plain terms discretionary power to that court in the appointment of guardians: McCann's Appeal, 13 Wright, 304."

McCann's Appeal decides that the court has a larger discretion than simply to determine as to the character and fitness of the party chosen.

The nominee of the petitioner is an honest, worthy and responsible person. The petition is based upon the naked legal right of the minor to choose a guardian, at any time after she arrived at the age of fourteen years. No special or material advantages are shown for confirming the nomination.

The minor already has a guardian well qualified to care for and manage her small estate, and also has placed the care of the ward's person in the charge of the step-mother. A change of guardian would necessitate the filing and auditing of the present guardian's account, allowance of commissions, with the costs and expenses incident thereto, and the costs incident to the appointment of the new guardian, with further expenses for the filing and auditing of a second account and additional commissions.

Taking into consideration all the circumstances of the case we do not feel justified in sanctioning a change of guardian.

Now October 30, 1909, the application of the petitioner "to make change of a guardian" is refused.

A city which permits a smooth iron door to cover an excavation in a sidewalk for a long period of time, during which many persons fall upon it, is held, in *Smith vs. Tacoma*, 51 Wash. 101, 98 Pas. 91, 21 L.R.A. (N.S.) 1018, to be liable for a personal injury caused by such fall.

A municipal sidewalk is held, in *Kawiecka vs. Superior*, 136 Wis. 613, 118 N. W. 192, 21 L.R.A. (N.S.) 1020, not to be, as a matter of law, unsafe so as to come within the meaning of a statute imposing a liability upon the municipality for injuries to pedestrians caused thereby, merely because, in making repairs, a patch of 2 inch planks was spiked on top of the former planking, so as to leave an abrupt inequality in height of 2 inches between the two portions of the walk.

In the Court of Common Pleas of Lackawanna County.

No. 1778 September Term, 1909.

*In Re: Petition of the Ontario, Carbondale and Scranton Railway
Company for Leave to Construct Grade Crossings Over
Certain Highways.*

Grade crossing—Method of Procedure—Act of 1901, P. L. 531.

Where a Railroad Company intends to extend its lines and to construct grade crossings, outside of the limits of a city of the second class and along a sparsely settled district, and it appears that only six trains a day will pass over the extension and the unobstructed view on each side of the said grade crossings varies from 500 to 1500 feet, the Court, on due petition in accordance with Section 4 of the Act of June 7, 1901, P. L. 531, has the power to grant permission to construct such grade crossings.

The Court may, however, impose conditions and direct such a construction as will safe-guard the traveling public.

Mr. James G. Burr for petition.

Opinion by H. M. Edwards, P. J., November 8, 1909.

The act of 1901, P. L. 531, section 4, provides a method by which a railroad or highway may cross each other at grade outside of cities of the first and second class. The party desiring such construction shall petition the court of common pleas, and the court shall fix a time for a hearing at which all parties interested may be heard. If the court is satisfied that such construction is reasonably required to accommodate the public or to avoid excessive expense in view of the small amount of traffic on the highway or railroad or for other good and sufficient reasons, it (the court) may make an order permitting such crossing at grade to be established, subject to such regulations as may be deemed proper as to signals or safe-guards.

At the hearing on the petition now before us evidence was heard; and, in order to understand the situation thoroughly, we made a personal inspection and examination of the territory through which the railroad is to be constructed. The following facts are established:

1. The construction intended is an extension of the petitioner's railroad, about four miles in length, running through a strip of territory located in the extreme westerly part of the borough of Taylor down to the Sibley breaker in Old Forge borough. The

purpose of constructing the extension is to secure coal and, possibly, other freight. It is estimated that six trains will pass over the said extension every twenty-four hours.

2. The territory which the extension will traverse is very sparsely settled, and much of it is rough and uncultivated. It is rural in character and constitutes the westerly outskirts of the borough of Taylor.

3. It is intended to construct three grade crossings, designated in the evidence by the numbers one, two and three. Crossing No. 1 is over the road known as the Bald Mountain Road, which has little public travel. Crossing No. 2 is over the New Milwaukee Road. This is the highway over which there is most travel. Crossing No. 3 is to a great extent an abandoned highway, the New Milwaukee road having taken its place so far as public travel is concerned.

4. The unobstructed view on each side of each of said crossings varies and is from 500 to 1500 feet.

While the policy of legislative railroad regulation is against grade crossings the legislature, nevertheless, recognizes the existence of certain conditions under which grade crossings may be allowed. The case now before us comes easily within the requirements of the fourth section of the act of 1901.

It is, therefore, ordered and decreed that the prayer of the petitioner be allowed, and that the petitioner be permitted to construct its railroad at grade over the highways described in the petition, the crossings being designated in the evidence as Numbers 1, 2 and 3. Having regard for the safety of public travel, even where the travel is small and the territory traversed is sparsely settled, we impose the following conditions on the petitioner:

1. The petitioner shall at each of said crossings plank the highway inside and outside of the rails to the width of the traveled part of such highway.

2. At the crossing over the New Milwaukee Road (Crossing No. 2), the petitioner shall keep a flagman to give warning of the approach of all trains.

3. We direct the petitioner to pay the cost of these proceedings.

In the Court of Common Pleas of Lackawanna County.

No. 1 May Term, 1908.

In Equity.

E. J. Northrup, et al. vs. Lephe Lall, et al.

Conclusions of Fact and Law and Decree Nisi.

*Fraud—Undue Influence—Confidential Relations—Cancellation
of Deed—Power of Chancellor—Statements of Grantor*

Confidential relations exist between an aunt and her nieces. A false impression is existed in her by the nieces that the homestead, to the sale of which she always greatly objected, was as a matter of necessity about to be sold, and her credulity imposed upon by a false apprehension that the sale of her own real estate was essential as a means of saving the homestead. She objected to making a will, and thereupon an Attorney, a mutual relative acting in a business and confidential capacity for the aunt and the nieces, draws a deed, which the aunt executes, whereby she acquires a life interest in the homestead and conveys in fee to her nieces her own real and personal estate, subject to her control and use during her natural life. After this conveyance, the aunt received no rents from the homestead, which was rented part of the time, nor did the nieces exercise any control over the former real estate of the aunt, and upon her death in their petition for Letters of Administration the nieces allege that she died seized of such real estate.

Held: That the nieces are trustees ex maleficio to the use of the aunt's heirs at law, and that a chancellor has the right to cancel such a conveyance as made in bad faith.

In such a case the relations of trust and confidence are not to be tested by any ties of blood but rather by the nature and quality of the terms on which the parties are associated, and the burden of proof to show good faith is upon the nieces.

The statements of the aunt, the grantor, made subsequent to the date of the conveyance are of doubtful validity.

Messrs. Leach and Morrow, for plaintiffs.

Messrs. Willard, Warren & Knapp, and Mr. George B. Davidson, for defendants.

Opinion by E. C. Newcomb, A. L. J.

November 12th, 1909.

The plaintiffs sue as heirs at law of Mary A. Hall, late of Glenburn, this county, deceased. They sue as well for themselves as for all other heirs who may choose to become parties. They are numerous. The prayer of the bill is for cancellation of decedent's deed made some five or six months before her death. In substance it is alleged by the bill that the deed was procured by fraud, coercion and undue influence, at a time when the decedent was feeble in

mind and body. Defendants answered responsively and issue was formally joined. Trial began late in March, this year, but it was subject to interruptions and was proceeded with from time to time by agreement to suit the convenience of the parties. The case was argued and submitted September 14th. The record is voluminous; much of the evidence, however, is both immaterial and irrelevant though it went in without objection.

From the pleadings, evidence and arguments of counsel I find the following:

CONCLUSIONS OF FACT.

1. Mary A. Hall was the daughter and one of the devisees under the will of Jonathan Hall, who died at the village of Glenburn, this county, then Luzerne, in 1865. The premises where he had then for many years been living are known in the case as the Hall Homestead. It consisted of a farm with its improvements. This he devised to his son William C., subject *inter alia* to a provision in favor of the daughter in these terms: "I also give to my daughter, Mary A. Hall, rooms and a home in the Homestead so long as she shall remain single in life." In addition to several legacies to his other children there was a further bequest to Mary of a certain parcel of land and five hundred dollars in money. The testator specified certain terms of payment to be observed by his son William C., and coupled with that the following: "and each of the legatees as they receive their money shall give to the said William C. Hall their certificate of release from all claims upon my estate by virtue of this will." The arguments of counsel on both sides have assumed that William was named as executor and that he served accordingly.

2. At the time of the testator's death William and his family, as well as Mary, were living with him in the Homestead, but whether all as one family does not appear. Mary had lived there from childhood, having been born there in 1827. When the father died she was about thirty-eight years of age and unmarried. She retained her home there about five years after that. Then for some reason, not distinctly appearing, she took up her residence elsewhere in the neighborhood and remained away until her brother's death in 1892. In 1870, probably about the time she left the Homestead, she had

signed a receipt in form as follows: "April 1, 1870, received at sundry times \$150.00 in full from all claims against the estate of Jonathan Hall." The receipt is produced by the defendants who are the daughters of William, to whom it may be presumed to have been delivered by Mary.

3. On William's death the Homestead passed to his three daughters. One of these was Harriet who was married to Rev. Mr. Shoemaker and lived elsewhere. The other two were Lephe and Jessie, the defendants. From that time until the death of William's widow, in 1900, Mary lived at the Homestead the greater part of the time. From 1900 to the time of her death there is no question that she had her home there with the defendants, subject at times to interruptions when the house was occupied by summer residents from Scranton. Whether she had any specific right there under her father's will, or had extinguished that by her receipt of 1870, was a mooted question in the family. But that she claimed the receipt had not been understood or intended by her as a release of the Homestead right, is not disputed. Neither is it disputed that in the opinion of Mr. Davidson the receipt did not so operate. He is a member of the bar and participated as counsel and attorney in and about the conveyance in question, as hereinafter stated. It is also certain that the old lady was much attached to the Homestead; that the attachment grew with the passing years; that she vacated temporarily in the summer with marked reluctance; and that at the time of the deed in question it was her most cherished desire to spend her declining years there undisturbed. With her nieces her relations were close and affectionate. As regards Lephe they were intimately confidential. The latter was possibly her favorite niece. She was entrusted generally with the Aunt's confidence in such business and other correspondence as she had. She was consulted by the Aunt in her money transactions and was familiar with her property, the disposition of which was in the later years of her life, discussed between them, sometime in company with Jessie, the other defendant. In the Summer of 1905, Mrs. Shoemaker, the other niece, was at the Homestead. The defendants desired the aunt to make a will. This she declined to do, though she intimated an indefinite intention that these nieces should have the principal benefit of her estate.

Mrs. Shoemaker requested that she should not be taken into account and that whatever the aunt desired to give, be given to the unmarried nieces. But on her refusal to make any disposition of her property the defendants requested the aunt to release them from their promissory notes which she held for loans amounting to several hundred dollars. With this she complied. At other times she expressed an intention to give some part of her property to other relatives. Eventually she formed the determination not to make a will. Of that the defendants were fully aware. As long as the aunt lived she adhered to this determination.

4. At times during the last years of the old lady's life the defendants gave her to understand the Homestead was for sale. At first it was ostensibly for the advantage of a smaller place for their common home. The suggestion was made by Lephe that the aunt might buy the Homestead, or that she exchange her adjoining property for it. Apparently no change of residence was contemplated in this, as there was no house on the old lady's property. Nothing came of the suggestion. But any proposal to part with the Homestead always brought on expressions of grief and protest from the aunt.

5. In the spring of 1906, she and Lephe were at home alone. Jessie had been in New York since January, and Mrs. Shoemaker was living in Chicago. Early in May, Lephe advised her aunt that the sale of the Homestead had become necessary in order that the sisters could realize their shares, upon which she said they were urgent. To confirm this she read to the aunt a letter from Mr. Shoemaker in which it is claimed the sale was insisted upon. Neither the letter nor a copy has been put in evidence. Shortly afterwards in the same month on returning from Scranton Lephe advised the aunt that she had found a buyer and that the house with a few acres of land was to be sold to George Hall of Scranton, who would be there in a few days to look it over and close the deal. As to how the aunt received this information there is only the testimony of Lephe, who admits that the old lady was displeased. This was followed by a letter summoning Jessie home. This, Lephe says, was at the instance of the aunt who was imperative in the matter. Jessie answered and waited for the second letter and then came home May 24th, 1906, remaining till May 29th.

6. May 28th, 1906, the aunt and these two nieces executed mutual conveyances by the deed in controversy, of which a copy is exhibited in the bill. The paper had been prepared in duplicate. Only one was at that time executed. The acknowledgment of that was taken by Mr. Davidson, who had prepared it and was present at the house for that purpose, as hereinafter stated. The other was sent by Lephe to her sister in Chicago, and sometime in the summer it came back duly executed and acknowledged by Mr. and Mrs. Schoemaker under date of June 27th. Both papers were then put in the hands of Mr. Davidson. He held them until after Mary Hall's death. He then sent them to the Shoemakers to have the deed re-executed on their part by signing and acknowledging the copy which bore the other signatures. That was done in December, 1906. The same notary public took the acknowledgment and at the request of Mr. Shoemaker certified it as of June 27th, the date when the duplicate had been by them acknowledged. Both papers were then returned and on 17th of December, that year, were recorded here by Mr. Davidson.

7. Reference to the paper shows that it purports to give the aunt a life estate in the Homestead; and on her part to convey to the defendants in fee all and singular the property real and personal of which she was possessed, subject to her "control and use during her natural life." This consisted of twenty-five or twenty-six acres of land adjoining the Homestead worth about \$5000.00, a parcel of land in Wayne County admittedly worth \$500.00; and cash, securities, etc., estimated at about \$2500.00. It may be noted that in the deed the area of the Mary Hall land in Glenburn is given as about 22 acres. Mr. Davidson says that allowed for about four acres which was expected to be conveyed to a trolley company for right of way.

8. Recitals in the conveyance purport to show that the moving consideration for the transfer of her property was the old lady's desire that the Homestead should "be her home during the balance of her life." It is further recited that a sale of the Homestead "is contemplated by the heirs of William C. Hall;" and that "to prevent the sale and retain the said Homestead as her home during the term of her natural life, Mary A. Hall desires to have the said Homestead conveyed to her."

9. The day the deed was made Lephe went to Scranton to see Mr. Davidson. This, she says, was at the aunt's request to have him come to Glenburn. He was the nephew of the old lady and had often advised with her professionally and in business matters. He drew the deed at his office under Lephe's supervision. In the first instance he drafted a paper which she disapproved and it was destroyed by her direction. He says it "was in the nature of a will." Lephe told him the aunt wouldn't sign it. The present writing was then drawn. It was intended by both Lephe and him to operate for all beneficial purposes as a will in favor of the defendants. Late in the afternoon they returned together to Glenburn, where the deed was executed as above stated by all parties except the Schoemakers. While he claims to have acted for both parties to the transfer, a consideration of all the circumstances satisfies me that Mr. Davidson actually concerned himself on behalf of his cousins, rather than for the aunt; that he only represented her in form; and it is so found.

10. In June following the Homestead was given up to a tenant for the summer. He vacated about the first of October. In the meantime the old lady boarded elsewhere, at her own expense, and again joined Lephe in the house in October. She died there, intestate, November 22nd, the same year, one week after suffering a paralytic stroke. She had never been married and left to survive her as her next of kin only collateral heirs, among whom are the plaintiffs. Two of these join in the suit as her personal representatives, no doubt, because the deed in question covers both personal and real estate.

11. At her death Mary Hall was 79 years of age. During the last year of her life she was visibly failing in strength. There was no impairment of her mental faculties other than such as is incidental to the weakness of old age. She had no special ailment but was noticeably wasting in flesh. In other words, it was manifest to her friends that she was rapidly declining.

12. Lephe's claim that she had made an oral bargain to sell the Homestead to George Hall and that such sale was in actual contemplation is seriously controverted. She is contradicted by both Mr. Hall and his wife. The weight of the evidence is believed to be against her. I am not satisfied that she advised her aunt of the

alleged bargain in good faith. On the contrary I cannot resist the impression that the communication was made to the aunt in bad faith with intent to excite a false apprehension and thus to constrain her to transfer her own property as the only means of preventing the loss of her home. Neither am I satisfied that Lephe acted in good faith in asserting the necessity of a sale in order to meet the demands of her sisters. At all events, nothing has ever been done toward dividing the Homestead property between her and her sisters. Nothing has been done to dispose of it except to hold it for sale at a price from one to two thousand dollars above what possible buyers have been willing to consider. How the acquisition of title to the aunt's property would relieve the demands of the sisters for their share of their father's estate does not appear.

13. No apparent change of property in the Homestead occurred during the few months that the old lady survived. On the other hand, she continued to exercise ownership of the land which she had granted to the defendants. In July, following the deed, she conveyed a parcel thereof to a railway company for right of way. True, she had given the company an option some months before she transferred title to the defendants, and it is, at least tacitly, conceded that the company had no notice of the transfer. She took none of the rents, issues or profits of the Homestead property, although Lephe claims to have offered her the rent received from the summer tenant. This, she says, was in accordance with the aunt's express wish, viz., that she should "look after" the aunt's affairs generally.

14. According to the terms of transfer, "possession and control of the old homestead shall at once vest in Mary A. Hall and continue during her lifetime." When she left in June she went with expressions of great reluctance. What she said is consistent only with the inference that she felt compelled to vacate for the summer tenant. He occupied the house under an oral agreement with Lephe. This was made shortly before the deed, but the aunt was in no way a party to it. Lephe, however, claims she took the life estate with full knowledge of the outstanding tenancy and voluntarily acquiesced in it.

15. January 25, 1907, letters of administration upon the aunt's

estate were granted to the defendants. That was in pursuance of their formal application verified by their joint affidavit. While not affirmatively proven, it has been assumed in the argument that they were then acting under advise of Mr. Davidson as their attorney and that the application is in his hand writing. It is therein averred that the aunt died seized of personalty to the value of \$2500.00 and of real estate to the value of \$2300.00. This was stated to be "about 20 acres, Glenburn Borough, Lacka. Co., Pa., and about 50 acres in South Canaan, Wayne Co. Pa." It is not disputed that the property there referred to is the same now in dispute. This was more than two months after the aunt's death, and more than one month after the affiants had, through Mr. Davidson, recorded the deed in question. Neither he nor they have offered any explanation of the apparent conflict between the assertion of the aunt's title at that time, and the present claim of title in the defendants under her deed. In the meantime their letters have been vacated, after a contest, and others granted to the present administrators. In the absence of any explanation I cannot reconcile these conflicting declarations of the defendants consistently with their consciousness of good faith on their own part and of the integrity of the transaction by which they secured the deed.

16. September 14th, at the argument of the case, counsel on both sides withdrew their respective objections to the competency of witnesses based on the surviving party and adverse interest clause of the act of 1887.

The word "grantor" as hereinafter used will be understood to refer to Mary A. Hall, deceased, unless otherwise indicated.

It is believed that the foregoing facts give rise to the following:

CONCLUSIONS OF LAW.

1. That the grantor's rights were in the Homestead under her father's will and whether her receipt of 1870 was effective to extinguish them need not be decided.

2. But the fact that Mr. Davidson believed the receipt did not have that effect, coupled with the knowledge that the grantor claimed it was not at the time so intended by her, goes to the good faith of the transaction, and is pertinent as showing that the ostensible consideration moving to the grantor was assumed for the benefit of the

defendants and to the grantor's prejudice. As such it was an apparent, rather than a real consideration.

3. The evidence does not warrant the conclusion that the deed is voidable for want of mental capacity of the grantor. It does, however, warrant the finding that at the time in question she was in feeble health and strength by reason of old age.

4. Between her and the grantees—more especially Lephe Hall, who was active in the matter—there was such relation of confidence as casts upon the defendants the burden of proving that no deception was practiced upon, nor unfair advantage taken of, the grantor in the premises.

5. The grantor's physical weakness due to the infirmities of old age operated to increase defendants' burden of good faith in their dealings with her.

6. The evidence is insufficient to satisfy the conscience of the Court either that the grantor got, or was by defendants intended to get, any real consideration for the deed; or that in other respects the transaction is free from suspicion that unfair advantage was taken of her.

7. On the contrary the evidence warrants the conclusion that her credulity was imposed upon in respect to the alleged impending sale of the Homestead, and that she conveyed her property because she had been adroitly deceived into the false apprehension that it was inevitable as the only means of saving her home.

8. This is decisive of the issue against the defendants.

9. The plaintiffs are, accordingly, entitled to a decree to the effect that defendants hold title under the deed in question as trustees *ex maleficio* to the use of the grantor's heirs at law.

10. In order that complete relief be had it should be decreed that the deed be surrendered for cancellation.

11. The defendants should pay the costs.

Let a decree *nisi* be entered in conformity with the last three conclusions of law, and exceptions, if any, be filed within ten days after notice *sec. reg.*

Numerous requests for conclusions of fact and law have been submitted on both sides. Those of the plaintiffs are believed to have been so covered by the foregoing that specific answers may be dispensed with as useless repetition.

DEFENDANTS' REQUESTS FOR CONCLUSIONS OF FACT.

The first three need not be restated as they are substantially so found in my general conclusions.

4. During the year 1906, both before and after May 28, 1906, and up to within a few days before her death in November, 1908, Mary A. Hall, while not as strong in health as in previous years, was in fairly good health for a woman of her age, and her mind was clear. She fully understood what property she had and was fully able to decide for herself what she wished to do with it. Throughout her whole life she was a person of rather more than ordinary keenness of intellect and ability in the transaction of business and she had a firm and determined will. While the feebleness of old age had to a certain extent impaired her physical strength, her qualities of mind and will remained practically unimpaired until she was stricken with paralysis only three or four days before her death.

5. During the last few years of her life, Mary A. Hall lived the most of the time with her nieces, Lephe A. Hall and Jessie Hall, the defendants, at the Old Homestead, and she often expressed the determination, to them and others, of arranging her affairs so that they would come into her property upon her death. In the summer of 1905, she had a long conversation with the defendants and a sister of the defendants whose name was Harriet and who had married Rev. E. E. Shoemaker and was living in Chicago but spent a portion of the summer of 1905 with her sisters at the Old Homestead. At this conversation Mary A. Hall specifically mentioned her determination to leave her property in such a way that these three nieces would come into it upon her death. At this time Harriet said that she wished to be counted out of any such arrangement for the reason that she was married and had a husband to take care of her while her sisters, Lephe Hall and Jessie Hall, were not so provided for. And from that time on it was fully understood by the defendants that it was the desire of Mary A. Hall to arrange her matters that they, the defendants, should have her property at her death.

6. In the spring of 1906, the Homestead property, together with the farm upon which the same was situated, was owned by the defendants together with their sister, Harriet Shoemaker, and efforts were being made to sell the Homestead because it was supposed

that this was the most available to bring in ready money. Jessie Hall at this time was endeavoring to secure a musical education and was under great expense and Harriet Shoemaker was desirous of having her portion of the proceeds which might be derived from such sale, and both these were insisting, and had been for sometime previous, upon an immediate sale of such a portion of the property of the three sisters as was most available to bring in money. Several different people had been negotiating for it, and such sale was in serious contemplation. Of the proposed sale Mary A. Hall was kept informed from time to time as the negotiations progressed. This course, however, did not suit her as she had a strong desire to reside in the Old Homestead as long as she lived, and in May, 1906, when the negotiations seemed to take a more serious turn and it looked as though a sale might be made, she insisted that Jessie Hall, one of the defendants, be sent for to come home from New York for the special purpose of carrying out the arrangement which had been talked of the year before, which was that she, Mary A. Hall, should be allowed to acquire a life interest in the Homestead and at the same time carry out her long cherished wish of arranging her affairs so that Lephe Hall and Jessie Hall should come into her property at the time of her death. Jessie Hall came from New York upon the express desire of her aunt and upon her arrival the matter was fully discussed and Mary A. Hall insisted that George B. Davidson, Esq., who was her nephew and legal adviser, and who was a practicing lawyer of Scranton, about ten miles away, be requested at once to prepare the necessary papers to carry out what had been fully agreed upon and decided upon by Lephe A. Hall, Jessie Hall and Mary A. Hall after full consultation and consideration.

7. On May 28, 1906, Lephe A. Hall, at the express wish of her aunt, Mary A. Hall, came to Scranton and procured George B. Davidson, Esq., to prepare the deed or indenture which is printed in the plaintiffs' bill and which is sought by this bill to be set aside. He prepared it in duplicate, that is to say, two copies, one a carbon copy of the other, and when the same was prepared Mr. Davidson and Miss Lephe Hall took the train for Glenburn where they found at the Old Homestead Mary A. Hall and Jessie Hall, and the paper so prepared was presented and read over in the presence of all the

parties, to wit., Lephe A. Hall, Jessie Hall and Mary A. Hall, and left with Mary A. Hall for an hour or so in order that she might more fully and carefully study its provisions. She expressed herself as being satisfied with it after a full and careful examination and it was executed on the same day or evening, that is to say, one of the two copies was signed and sealed by Mary A. Hall, Lephe A. Hall and Jessie Hall in the presence of Margaret Evans, who had been called as a subscribing witness, and in the presence of George B. Davidson, who was acting as attorney for all parties, he being the nephew of Mary A. Hall and the cousin of Lephe Hall and Jessie Hall, and he also being a notary public for the County of Lackawanna. The paper was acknowledged by the said parties before him as such notary. He was then directed by Mary A. Hall to take all the necessary further steps to see that the arrangement was carried out. Harriet Shoemaker, one of the then owners of the homestead property, was in Chicago with her husband, Rev. E. E. Shoemaker, and the subject of sending the paper on to have the signatures of Mr. and Mrs. Shoemaker attached was brought up and Miss Lephe Hall suggested that it would be necessary for her to write a letter explaining the whole transaction and requesting them to execute the paper. Consequently, the two copies were left by Mr. Davidson with Lephe A. Hall for the purpose of being sent out and executed by the Shoemakers. Lephe Hall did not at that time send the copy which had been signed by the others to the Shoemakers in Chicago for fear it might be lost in the mails, but sent the carbon copy instead. This carbon copy reached the Shoemakers sometime in the early part of June, 1906, and was executed by them and acknowledged before a notary public in Chicago on the 27th of June, 1906, and as Mr. Shoemaker was coming east and expected to visit Glenburn, he retained possession of it until the 7th of July when he delivered it to Lephe Hall at Glenburn borough, and about the same time Lephe A. Hall, in the presence of Mary A. Hall, delivered both copies, one signed by Mary A. Hall, Lephe A. Hall and Jessie Hall and acknowledged before Davidson, notary public, and the other signed by Harriet H. Shoemaker and Elmer E. Shoemaker and acknowledged before Mattie Ruston, notary public, to George B. Davidson, attorney for both parties, with instructions that they be safely kept for the protection of the rights of all parties thereto.

Davidson intended to have the papers recorded in the recorder's office but the awkwardness of having two separate copies, one executed by some of the parties and the other by some others of the parties, led him to withhold them from the record for the present as he was expecting the arrival of Mr. Shoemaker and his wife, who were coming east during the course of the summer, and he thought it would be better to get them to sign the papers which had previously been signed by the others. Another reason why he did not put them on the record at once was that Mary A. Hall had previously given an option to the Northern Electric Street Railway Company for a right of way through her tract of land in Glenburn borough and this was expected to be closed up by the delivery of a deed and payment of purchase money at any time, and he thought that it would be better not to complicate that matter by putting on record a title out of Mary A. Hall. This deal with the street car company was fully understood by all the parties and by Mr. Davidson, who had previously been consulted in relation to it, and at the time of the execution of the paper which is sought to be set aside by this proceeding, it was understood and agreed that Mary A. Hall should go on and make the deed to the street railway company and receive the purchase money as fully as though the paper of May 28, 1906, had not been executed.

Answer: In large part these are so found in the general conclusions. In some respects the requests are too broadly stated, and in point of accuracy each is open to some objection. Therefore they are not so found.

8. There was no undue influence or fraud practiced by either of the defendants in order to procure the execution by Mary A. Hall of the deed in question. It is true that Mary A. Hall had expressed an aversion to signing a will, and for that reason Lephe Hall directed George B. Davidson in preparing the paper not to use the words "will and testament", but in this there was no fraud or wrong done to Mary A. Hall. The paper as executed by Mary A. Hall differs in a most important particular from a will and testament in that it bestows upon her the right to the Old Homestead for the term of her life, together with the agreement of Lephe Hall and Jessie Hall that they would furnish the home and support and all expenses and re

pairs. This is the way the matter was understood by Lephe A. Hall and Jessie Hall, and they have never evinced any desire to shirk their obligations. The value of the homestead with one or two acres surrounding it, at the time this deed was made, was in the neighborhood of five thousand dollars or six thousand dollars, but the deed conveys a life estate not only in the homestead but in twenty-five acres of land, which would be worth considerably more. It is true that an arrangement had been made with Mr. Lansing's family that they were to have the homestead for the summer of 1906. This arrangement was made before Mary A. Hall sent for Jessie Hall to come home from New York, and by reason of this arrangement having been made, the family was scattered during the months of July and August and a portion of the months of July and September, 1906, but as soon as the Lansings moved out Mary A. Hall and Lephe Hall moved back into the Old Homestead, where a home was provided for Mary A. Hall until the time of her death in November of the same year.

Answer: It is not so found.

DEFENDANTS' REQUESTS FOR CONCLUSIONS OF LAW.

1. Under the testimony in this case and the facts found by the court, there was no such undue influence and fraud on the part of the defendants or either of them, as would move a chancellor to set aside the deed in question, and the plaintiffs' bill should be dismissed.

Answer: Refused.

2. Under the testimony and facts found by the court, there was no such mental disability on the part of Mary A. Hall as to render her deed void, and the plaintiffs' bill should be dismissed.

Answer: Affirmed as to the question of mental disability, but as to dismissal of the bill, refused.

3. Under the testimony and facts found by the court, Mary A. Hall executed the deed in question voluntarily and of her own free will and accord and while in the possession of sufficient mental ability to have a clear conception of what property she owned and what disposition she wished to make of it, and the deed, when so executed, came to the hands of George B. Davidson, Esq., an attorney-at-law who was acting as attorney for all parties, which constituted a good

delivery of the deed, and the same took effect upon such delivery, and the plaintiffs' bill should be dismissed.

Answer: As drawn this is refused.

DISCUSSION.

On the facts as I have felt compelled to find them the law of the case is believed to be free from difficulty. The parties are not strangers to me and for personal reasons the conclusions on which the case turns have been reached with reluctance. But looking at the face of the deed in the light of all the evidence I cannot resist the conviction that in the apparently studied effort to give it the appearance of righteousness, the fact was unconsciously betrayed that the old lady was imposed upon and deceived by those on whom she had a right to rely with confidence. That one of her nieces, at least, stood in a confidential relation with her is not seriously questioned. Indeed I cannot see how it is open to question. It is well settled that the existence of such relation is confined to no specific or conventional class of trusts. It embraces all persons associated by any relation of trust or confidence: *Darlington's Appeal*, 147 Pa., 624. I apprehend the test of its existence is the nature and quality of the terms on which the parties are associated, not the technical character or description of the trust arising therefrom. It is not to be understood that the fiduciary status here springs from the mere fact that the parties were connected by ties of blood. If there were nothing more than the natural relation of an aunt to her nieces the question would be only one of actual fraud, as to which the plaintiffs would have the burden of proof. But if the conclusion is well founded that in point of fact a relation of personal trust and confidence existed between them, it follows that the defendants have the burden of justifying the transaction. That is so, regardless of the question whether the transaction amounted to a voluntary conveyance, or was a sale for a valuable consideration. The rule is general as founded on a general policy of the law, and is quite independent of any notion of actual fraud. It is now so familiar that it calls for no discussion or citation of authority. Reference is made, however, to the following cases: *Greenfield's Est.*, 14 Pa., 489; *Yardley vs. Cuthbertson*, 108 Pa., 395; and *Darlington's Appeal*, *supra*.

Starting, then, with the parties to it standing in this relation, it will be observed that the deed was attended by a group of undisputed circumstances the force of which can neither be denied nor evaded.

(1), The grantor was aged and infirm; (2), her mind was a prey to anxiety and dread at any prospect of parting with the homestead in which she had her home; (3), at an earlier date the defendants had reason to expect they would be her devisees; (4), that hope had become disappointed by her determination against making a will; (5), the motive impelling her to give up her property by deed was her belief that it was necessary in order to avert the sale of the homestead; (6), this belief was induced by the specific assertions of one of the defendants; (7), these assertions the other defendant tacitly affirmed by becoming a party to the transaction, with notice arising from the face of the writing; (8), from that time ever since there has been no apparent occasion to dispose of the homestead; (9), instead of their right under the deed, on the death of the aunt, the defendants asserted her title,—not inadvertently but—after the lapse of two months and then under advice of the attorney who had been privy to the whole transaction, though now supporting their claim.

If this were all, the suspicion of bad faith would be irresistible. But it is not all. For while the further question whether the old lady was actively deceived in regard to the intended sale of the homestead in dispute, I have with regret felt compelled to determine it in the affirmative. Hence, it is of no avail to say there is evidence that she expressed herself as being content with what she had done. The attempt either to impeach or support a conveyance by subsequent declarations of a deceased grantor or testator is always of doubtful validity. But waiving that, and giving to the declarations relied on by defendants here their utmost effect, they are not at all inconsistent with plaintiff's contention. Regarded as a choice of alternatives it may well be that the grantor never regretted her choice. For there is no reason to believe that during the short time she survived she became aware that the alternative as presented to her was not real but feigned. The defendants' case can derive no advantage from what the aunt afterwards said on the subject if all

her declarations are taken in consideration. If that be done a doubt would arise whether she knew the nature of the instrument she had signed. She afterwards conveyed a part of the land to the railway company. If that were all, I should be disposed to say it is accounted for by what Mr. Davidson says in explaining the deficiency in quantity as stated in the deed to defendant, although as a method of excepting something from the grant his expedient was ineffective and somewhat unlawyerlike. But there was something more in that connection. The sale to the company was made through Mr. Stevenson. When it was consummated she expressed the wish that he would undertake to sell the balance for her. He had no knowledge that her title had been already transferred; and to outward appearance she was equally unconscious of the fact. That she was then assuming to speak on behalf of the defendants is suggested neither by counsel nor by any view of the evidence. On the contrary the supposition would be at variance with their claim that it was expressly understood at the aunt's request that Lephe had taken over "all of her business and was going to look after everything for her."

It may be the defendants had an abiding conviction that upon the aunt's bounty they had the superior claim; that her final determination not to provide for them by will impressed them with a sense of wrong and injustice; that they set it down to the account of an old woman's caprice involving the repudiation of her *quasi* obligation; that they persuaded themselves the arrangement which they put in writing was the best provision the aunt could make for her declining years; and, therefore, the assertion of an impending sale of the homestead was a harmless deception, as intended only to quicken action for her own benefit.

If so, it is to their credit that when the time came to realize on the transaction their casuistry did not to themselves seem to ring true. So, upon their oath they said the aunt died seized. Their deed remains as a cloud on the title then and there acknowledged, which the owners are entitled to have removed.

Upon an indictment for perjury, it is held, *State vs. Coyne*, 214 Mo. 344, 114 S. W. 8, 21 L. R. A. (N. S.) 993, that evidence is admissible that, down to a date recently before the commission of the alleged crime, accused stood on the brink of paresis, and that his memory was wholly unreliable.

In the Court of Common Pleas of Lackawanna County.

No. 1524 September Term, 1909.

Commonwealth vs. Frank Caldwell.

Certiorari.

Cruelty to Animals—Summary Conviction—Certiorari.

Where a person is arrested on warrant of an Alderman and fined on summary conviction on a charge of cruelty to animals, and, on certiorari to the Common Pleas, nothing appears of record to show under what Statute the Alderman exercised jurisdiction.

Held:—That the record is fatally defective, and that in all cases of summary proceedings, penal in form and substance, the jurisdiction of the magistrate must appear on the face of the record.

Mr. P. F. Loughran for writ.

Opinion by E. C. Newcomb, A. L. J., November 22, 1909.

This is a very ragged record. Giving it the benefit of every doubt, it can only be said that defendant was summarily tried, convicted and fined on a charge of cruelty to animals, contrary to some act of assembly, the identity of which the alderman didn't consider it worth while to mention.

Bearing in mind that the accused is entitled to have the judgment reviewed on the question whether the alderman has exercised his jurisdiction in conformity with the statute, and, indeed, to have the validity of the statute itself passed upon, it becomes somewhat material to know what particular statute is involved in the case. It is not for us to search the acts of assembly and select for consideration such one as might to us appear to be in question. At this late day it ought to be understood that in summary proceedings, penal in form and substance, the magistrate's jurisdiction must appear on the face of the record. It is essential, therefore, that specific reference to the statute should appear. This rule has been so long familiar that authorities need not be cited.

But that is not the only fatal defect in this record. It nowhere appears that the supposed offense was committed within the confines of this county, or even of this commonwealth.

The judgment is reversed.

A motorman in charge of a street car is held, in *Riley vs. Consolidated R. Co.* (Conn.) 72 Atl. 562, 21 L. R. A. (N. S.) 880, not to be entitled to assume that an adult on the track in the path of the car will remove to a place of safety upon the sounding of a warning.

In the Orphans' Court of Lackawanna County.

No. 367, Year 1903.

In Re: The Estate of Rose Foley and Mary Foley, Minors.

Petition of Guardian to show cause why interest on legacies should not be paid, etc.

Legacies Chargeable on Real Estate.—Interest on Legacies—When Computed—Jurisdiction of Orphans' Court under Act of February 24th, 1834.

A, a testator, after directing his executor to pay all just debts, funeral expenses and charges of proving his Will, devises certain real estate to his daughter, B, who is directed to pay, out of said real estate, a stated amount to C and D, minor grand-children of testator. B, the devisee and executor, paid the debts in part out of the personal estate, leaving a balance of debts still unpaid and unprovided for, but did not pay the legacies, or any part thereof or interest thereon, to the minor grand-children and claimed that the unpaid balance of the debts should be charged proportionately against the minor grand-children.

Held:—That the devisees to the minor grand-children, C and D, are not liable or subject to any abatement in order to pay any part of the unpaid debts; and the real estate devised to B is chargeable with the payment of the legacies to the minor grand-children.

The interest upon the legacies, payable to C and D, the minor grand-children, is to be computed from the time such legacies became payable; which, in the absence of any limitation of time for payment specified in the Will, begins at the expiration of one year from the testator's death.

Mr. M. J. Martin, for Petitioner.

Mr. P. H. Campbell, for Exécutor.

Opinion by M. F. Sando, P. J., December 13th, 1909.

John Gibby died on the 30th day of June, 1903, survived by two daughters, Helen Campbell, Rosé Kelly, and two grandchildren, Rose Foley and Mary Foley, children of a deceased daughter. His will was dated the 2d day of April, 1901. The will provides inter alia, as follows:

"I order that all of my just debts, funeral expenses and charges of proving this will be in the first place fully paid and satisfied and after payment thereof, and every part thereof * * * * to my daughter Helen Gibby, now Campbell, I give and bequeath * * * * also my property on Franklin Avenue in the City of Scranton out of which the said Helen Campbell, my daughter, is to pay to each of my grandchildren, Mary and Rose Foley, the sum of Five Hundred Dollars each * * * * ." He appointed his "daughter Helen Campbell of Covington, executor." The will was probated on the 14th day of August, 1903, and letters testamentary were granted to Helen Campbell.

On the 22d day of September, 1909, the petition of Rose Kelly, guardian of Rose Foley and Mary Foley, minors, was presented to this court setting forth, inter alia, the devise to Helen Campbell, and averring that Helen Campbell had never paid the legacies of five hundred dollars, or interest on the same, and praying for a decree, against her for the payment of the interest, and that Helen Campbell give security for the semi-annual payment of the interest in the future.

Helen Campbell, by her answer, alleged that the personal property of the testator amounted to \$375.00; that she paid the debts of the testator amounting to \$1096.20, leaving a balance of \$721.20, unprovided for, and admits that she has paid no interest on the legacies. The respondent then asks that the minors, through their guardian, be directed to pay their pro rata share of the debts and costs of administration of the estate of the testator; that the guardian be commanded to file her account as guardian, and that the guardian further be directed to give security as guardian.

James Gibby a surety on one of the bonds given by the guardian having died, the guardian on October 23, 1909, after the instituting of these proceedings, filed additional bonds in the sum of one thousand dollars each, which bonds were duly approved by this court.

It would seem that the main contention of the respondent, that the pecuniary legacies bequeathed to the minors are liable to abatement, by the payment of their pro rata share of the debts of the testator, is not well founded.

The Act of February 24th, 1834, P. L. 84, section 59, under the provisions of which this proceeding has been brought by its terms and by the construction placed upon them by the Supreme Court, confers a comprehensive and exclusive equitable jurisdiction in the Orphans' Court in the case of Legacies charged on land. In *Pierce vs. Livingstone*, 80 Pa., 101, it was said by Mr. Justice Sharswood, in commenting on section 59: "It is very well settled that the jurisdiction of the Orphans' Court under this section of the act is exclusive."

If it appears from the language of the will that the testator intended to couple the payment of the legacy by the devisee with the devise of the land, so that the payment is to be made because, or as

a condition on which, the devise has been made, then the real estate is, in equity, chargeable with the payment of the legacy. In such case the payment of the legacy is a condition on which an unincumbered title vests in the devisee.

By the language "my property on Franklin Avenue in the City of Scranton out of which the said Helen Campbell, my daughter is to pay each of my grandchildren, Mary and Rose Foley the sum of Five Hundred Dollars each," the testator meant that the devise was to be burdened with the said sums until paid, and he could hardly have used fitter words to express his intention, that the land was to be so charged. The balance of the will need not be read to gather what he intended, for the words are self-explanatory, meaning that the daughter, Helen Campbell, was to have the land cum onere, with the sum directed to be paid to his grandchildren resting upon it.

The "property on Franklin Avenue" is the fund to which the beneficiaries must look for the payment of the pecuniary legacies bequeathed to them. Under the phraseology of the will, the land is the fund primarily liable for the payment of the legacies; and also exempts the personal estate from the payment.

The intention of the testator in his will was to make the legacies payable out of the land devised. Helen Campbell was to take the Franklin Avenue property subject to the payment of the legacies of five hundred dollars each to the testator's grandchildren, Mary Foley and Rose Foley. This intention to charge is plain.

The interest upon a legacy begins to run from the time it becomes payable; and in determining this time, the directions of the Act of February 24, 1834, P. L. 83, section 51, which provides that "legacies, if no time be limited for the payment thereof, shall in all cases, be deemed to be due and payable at the expiration of one year from the death of the testator," must prevail.

And now, to wit, December 13, 1909, it is ordered, adjudged and decreed, that Helen Campbell, pay to Rose Kelly, guardian of Rose Foley, the sum of one hundred, sixty-two and 50-100 dollars (\$162.50), within thirty days after the entry of this decree, the interest on the legacy of five hundred dollars from June 30, 1904, to November 30, 1909, which legacy and interest thereon is a charge upon the property on Franklin Avenue in the City of Scranton, devised to Helen Campbell.

It is further ordered, adjudged and decreed, that Helen Campbell pay to Rose Kelly, guardian of Mary Foley, the sum of one hundred, sixty-two and 50-100 dollars (\$162.50), within thirty days after the entry of this decree, the interest on the legacy of five hundred dollars from June 30, 1904, to November 30, 1909, which legacy and interest thereon is a charge upon the property on Franklin Avenue in the City of Scranton, devised to Helen Campbell.

The mere fact that a person rides on a crowded car, or the platform of such car, on the invitation of a railway company, is held, in *Lobner vs. Metropolitan Street R. Co.* (Kan.) 101 Pac. 463, 21 L.R.A. (N.S.) 972, not to be contributory negligence *per se*.

The reversal of a decree admitting to probate a will which does not nominate an executor is held, in *Hamilton vs. Williams* (Ky.) 118 S. W. 358, 21 L.R.A. (N.S.) 975, to authorize the revocation of the authority of one who has been appointed administrator with the will annexed, and the appointment of an administrator under the general administration statutes.

One who, for purposes of his own, attempts to make use of a private way, upon which the owner operates a railroad track for his own use, is held, in *Bowler vs. Pacific Mills*, 200 Mass. 364, 86 N.E. 767, 21 L. R.A. (N.S.) 976, not to be able to hold the owner liable for an injury caused by collision with cars in motion thereon, in the absence of anything to show that the injury was intentionally or wantonly inflicted.

To obtain injunctive relief against one who is manufacturing and selling parts of a stove bearing complainant's trademark, it is held, in *Reading Stove Works vs. S. M. Howes Co.* 201 Mass. 47, 87 N.E. 751, 21 L.R.A. (N.S.) 979, not to be necessary that others have been actually deceived thereby, if the resemblance is such that they are likely, upon comparison, to mistake one for another; nor is it held to be material that the consumer might be indifferent as to the source of the article which he obtains.

In the Court of Common Pleas of Lackawanna County.

No. 803 May Term, 1909.

Hall's Safe Company vs. Mathias Walenk.

Motion for Judgment Sec. Reg.

Replevin—Defenses to Writ—Variation of Written Contract

Foreign Corporation—Right to Sue in Pennsylvania.

A, a foreign corporation, through a traveling salesman, sells B, a citizen of this State, a safe on written contract whereby B is to pay certain instalments, as rent for the property, and upon payment of the whole amount named in the contract, the title is to vest in B; but, in default of payment as stipulated, redelivery is to be made to A. The contract, *inter alia*, stipulates that "it embodies all agreements of the parties and that all claims of verbal agreements of any nature, not embodied herein, are waived." Default is made in payments by B, a writ of replevin issues, and the defense attempts to show (1), a variation of the terms of the contract by parol; (2), a denial of the plaintiff's right to sue as being a foreign corporation doing business but not registered in this State in accordance with the requirements of law.

Held:—That the defendant's attempt to vary the terms of the written contract, without any allegation or proof of fraud, accident or mistake in the contract itself, is not permissible.

In such a case, the mere denial of the plaintiff's right to sue as being an unregistered foreign corporation doing business in this State, must be specific, and the burden is upon the defendant to show affirmatively at what time and place the plaintiff maintained an office or place of business in this State, or that a part of its capital is invested here, in order that such a defense may be available.

Act of April 22, 1874, P. L. 108, explained.

Messrs. Beers & Grambs for plaintiff.

Messrs. Vosburg & Dawson for defendant.

Opinion by E. C. Newcomb, A. L. J.

December 6, 1909.

This action in replevin to determine the ownership of a certain safe. Defendant exercised his right to retain possession on giving a counter bond. The plaintiff's declaration he answered by affidavit of defence. That being excepted to he afterwards filed a supplementary affidavit. The sufficiency of both is challenged by the present motion for judgment.

The suit arises out of a contract in writing, dated October 26, 1908, under which the safe was delivered by plaintiff to defendant. In substance defendant agreed to pay, as rent for the property, the sum of \$135, in instalments of \$16.00 every two months, the first of

which fell due February 26th this year. The contract provided for a sale and transfer of title upon the terms of payment being fully complied with. Coupled with that was a covenant for redelivery in case of "default of any of the payments above specified," etc. The writing is dated at this city and, in form, is an order or request addressed to the plaintiff company at its office in the city of New York, subject to its approval. Apparently it was delivered to the company's salesman here. It so appears by notation on the margin of the instrument. It was executed under seal and expressly stipulates, *inter alia*, that "it embodies all agreements" of the parties, and that "all claims of verbal agreements of any nature, not embodied herein, are waived."

The plaintiff is a corporation of the state of Ohio.

A breach by defendant is alleged in that he had failed and refused from that time ever since to pay any part of the rent, and also to surrender the safe, for which demand was made April 28th, this year, after two instalments had become due and unpaid. Neither of these averments is denied.

The defense taken is, (1), an attempt to vary the terms of the contract by parol; and, (2), a denial of plaintiff's right to sue, as being a foreign corporation, not registered in this state as required by the act of 22d April, 1874, P. L. 108.

The proposal to vary the contract merits no consideration. It undertakes to reform the writing by substituting another and different description of safe in place of that described in the paper. This, without any pretense of fraud, accident or mistake, and in the teeth of the stipulation against any variation in that way. Needless to say that cannot be done.

As regards the denial of the right to sue for want of registration, it is to be noted that there is nothing either in the declaration or on the face of the contract to indicate that plaintiff is within the operation of the act of 1874. To all outward appearances it was an order taken by a salesman soliciting trade for a non-resident manufacturer. As such it would be nothing more or less than a transaction of interstate commerce, with which our registry act does not attempt to interfere: *Blakeslee Mfg. Co. vs. Hilton*, 5 Pa. Sup. Ct.,

184; Mearshon & Co. vs. Lumber Co., 187 Pa., 12; Wolff Dryer Co. vs. Bigler & Co., 192 Pa., 466.

Hence, the burden is on defendant to show affirmatively that at the time in question plaintiff had an office or place of business in this state, or that some part of its capital was invested here, in order to bring it within the prohibition of the statute. This he may have attempted to do by his additional affidavit allowed to be filed after argument of the motion. But all he has said is this: "I am informed and believe and expect to be able to prove that the plaintiff corporation had offices and places of business in the state of Pennsylvania for several months prior to the time when the transactions between (himself) and the representative of the plaintiff took place, during which time they were engaged in business in the state of Pennsylvania," etc., contrary to law.

It will be observed that, so far as appears, any definite information which he may have as to the location or other identity of the "offices and places of business" in question, the affiant is careful to keep to himself. He is put to an affirmative plea in the matter, which would call upon his adversary to defend its right to sue in this commonwealth. Plaintiff is, therefore, fairly entitled to know at what place or places it is charged with having carried on its corporate business without authority.

But that is not all. To be available as a defense the transaction complained of must have been unlawful. The affidavit here neither negatives the *prima facie* legality of this specific transaction as one of interstate commerce, nor pretends to say the plaintiff was in business here at any time with which the case is concerned. For the sake of discussion it may be conceded that at some indefinite time in the past plaintiff carried on some part or all of its corporate business in this state without license. In itself that would have nothing whatever to do with the validity of the contract in suit.

So, no matter, as between these parties, whether the transaction be regarded as a bailment or conditional sale; in either event the case presented is simply that of a declaration setting up a valid cause of action to be enforced in form of replevin, and an affidavit of defense which traverses no averment material to plaintiff's re-

covery. At its best the affidavit is vague, indefinite and evasive.

The rule to show cause is, therefore, made absolute. Let judgment *de retorno habendo* be entered for plaintiff; damages, if desired, to be assessed on its motion by writ of inquiry *sec. leg.*

An interstate carrier is held, in *Gamble-Robinson Commission Co. vs. Chicago & N. W. R. Co.* (C. C. A.) 168 Fed. 161, 21 L.R.A. (N.S.) 982, not to subject a consignee to an undue or unreasonable prejudice or disadvantage within the meaning of the interstate commerce act, by exacting, after due notice to it, the prepayment of charges for transportation of all property consigned to it, while it does not require such charges to be paid in advance upon freight consigned to others, similarly situated.

A time certificate executed by a construction company to an employee in payment of a balance due upon open account, which stipulated that the same should be non-transferable, and should be payable only to the person to whom it was issued, when properly receipted by him in the presence of the paymaster of the construction company, the payee executing an agreement whereby he agreed to present in person the time certificate for payment, and that the same should be nontransferable, is held, in *Barringer vs. Bee Line Construction Co.* (Okla.) 99 Pac. 775, 21 L.R.A. (N.S.) 597, not to be assignable, and an attempted assignment of the same is held to be void as between the assignee and the maker of the certificate.

A master is held, in *Young vs. Mason Stable Co.* 193 N. Y. 188, 86 N. E. 15, 21 L.R.A. (N.S.) 592, to perform his duty to his servant with respect to the inspection of a freight elevator used as an accessory to the general work of the establishment by having it performed regularly by professional experts.

Constitutional provisions establishing courts of justice are held, in *Board of Trustees vs. McCrory* (Ky.) 116 S. W. 326, 21 L. R. A. (N.S.) 583, not to be infringed by statutory provisions making the decision of trustee of a police pension fund upon a claim final and conclusive.

In the Court of Common Pleas of Luzerne County.

No. 552 March Term, 1909.

Certiorari.

JENKINS VS. DAVIS.

*Wages—Attachment for board—Constitutional law—Const., art. iii,
sect. 7—Act of April 10, 1905.*

The Act of April 10, 1905, P. L. 134, providing for the attachment of wages for boarding or lodging, is in conflict with art. iii, § 7, of the constitution, forbidding special legislation changing the methods for the collection of debts. *Antreason vs. Samarsien*, 18 Dist. R. 335, followed.

Messrs. McQuade & Kleeman, for defendant.

Opinion by Ferris, J., June 21, 1909.

This was an attachment of wages before a justice of the peace for board under the Act of April 10, 1905, P. L. 134, which provides that all keepers of hotels, inns, boarding-houses and lodging-houses "shall have the right, in suits and actions brought before justices of the peace, to recover pay for boarding or lodging, or boarding and lodging furnished, to commence such suits or actions by attachment, and thereon to attach only wages due or owing to such person as may be indebted to them, or any of them, for boarding or lodging, or boarding and lodging, not exceeding in amount the sum due for four weeks. . . . And justices of the peace shall have jurisdiction of attachment proceedings in such cases."

Section 7 of art. III of the Pennsylvania constitution of 1874 provides that "the general assembly shall not pass any local or special law . . . regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, alderman, justices of the peace . . . or other tribunals, or providing or changing methods for the collection of debts," etc.

The Act of April 10, 1905, P. L. 134, was passed for the exclusive benefit of a special class of persons, viz., "all keepers of hotels, inns, boarding-houses and lodging-houses in this commonwealth." It is, therefore, a special law.

It (1) regulates the practice before, and (2) confers a new jurisdiction upon justices of the peace, and (3) changes the method (by

providing a new one) for the collection of a special kind of debts for the benefit of a special class of persons. In these three particulars it violates art. III § 7, of the constitution, and is void. The reasons which led the Supreme Court to declare section 28 of the Mechanics' Lien Law of June 4, 1901, P. L. 431, to be unconstitutional in *Portland Cement Co. vs. Allison*, 220 Pa. 382, are quite as applicable here. See, also, *Antreason vs. Samarsien*, 18 Dist. R. 335, where the same conclusion was reached by the Court of Common Pleas No. 1 of Philadelphia.

It follows that the justice of the peace was without lawful jurisdiction in the case at bar, and the exception raising the constitutional question must be sustained.

The judgment is, accordingly, reversed and the proceedings set aside.

A consumer, the price of whose commodity is raised by an excessive freight rate exacted from his vendor, contrary to the provisions of a statute, is held, in *State vs. Central Vermont R. Co.* 81 Vt. 459, 171 Atl. 193, 21 L. R. A. (N. S.) 949, not to be a party aggrieved by the illegal exaction, within the meaning of a statute giving such person a right to sue to recover the excess.

Failure of a purchaser of merchandise to notify the seller of a mistake in purchaser's favor in the draft for the price is held, in *Evert vs. Tower*, 51 Wash. 514, 99 Pac. 580, 21 L. R. A. (N. S.) 950, not to be fraud within the meaning of a statute providing that, in an action for relief upon the ground of fraud, the cause of action shall not be deemed to have accrued until a discovery by the aggrieved party of the facts constituting the fraud.

Charter authority to do all acts and make all regulations which may be necessary for the promotion of health or the suppression of disease is held, in *Landberg vs. Chicago*, 237 Ill. 112, 86 N. E. 638, 21 L. R. A. (N. S.) 830, not to empower a municipal corporation to provide for an exclusive grant to one person, upon his paying the amount bid therefor, of the right to collect and ship manure from the city.

In the Orphans' Court of Franklin County.

No. ———. Year ———.

*Petition for an Account.**Martin's Estate.**Executors and Administrators—Accounts—Jurisdiction, O. C.*

Upon an application to compel an executor to file an account at the end of a year from the granting of letters, the orphans' court has jurisdiction to exercise a sound legal discretion, as may best serve the interests of all parties concerned.

Letters were granted April 7, 1908; October, 1909, an application was made by the legatees to compel the executor to file an account, the answer to which averred that the fund was invested in interest-bearing securities, maturing in April, 1910.

Held, that an account should be filed for audit on April 30, 1910.

Mr. Watson R. Davison, for petitioner.

Mr. William S. Hoerner, for respondent.

Opinion by Gillan, P. J., October 26, 1909.

It seemed on the argument to be the opinion of counsel for the petitioner that nothing would excuse an executor from filing an account at the end of a year from the granting of the letters. To this we cannot assent. We have been pointed to no act of assembly nor adjudicated case which so declares. There is nothing in the law which deprives the court of exercising a sound legal discretion to order an account or not, as it may best serve the interests of all parties concerned. An account will not be ordered where there is no fund presently available for distribution: *Singerly's Estate*, 9 Dist. R. 261.

The condition of this estate and the facts connected therewith can be learned only from the petition and answer. There being no replication, the matters set forth in the answer are to be taken as true. The facts are as follows: Isaiah Martin died on April 1, 1908; he left a last will and testament, of which he appointed the respondents the executors; this will was probated April 7, 1908, and letters testamentary granted to the executors named therein. By his will he bequeathed to his wife during her natural life the income of the estate, and provided that, if that "proved not to be sufficient for her support," he was empowered to use so much of the principal as may be necessary for her comfortable maintenance. The estate consisted

of \$2400 in cash. The widow died on June 28, 1909. One of the legatees asks that the executors be compelled now to file an account. The executors reply that the money was by the widow invested in interest-bearing securities which will not mature until April, 1910; to undertake to convert them now would result in a loss to the estate. \$2200 of the fund is invested in savings banks, on which interest will be paid if the money is left until April 10, 1910; if withdrawn now, the interest will be lost; that is to say, one whole year's interest on \$2200. Nothing has been brought to our attention which makes this sacrifice necessary or will even justify it.

Now, Oct. 26, 1909, it is ordered that an account be filed in order that it may be presented for the action of the court on Saturday, April 30, 1910; it is further ordered that the costs of this proceeding be paid by the estate of Isaiah Martin, deceased.

That a corporation cannot be convicted of homicide under a statute defining that crime as the killing of one human being by the act, procurement, or omission of another, is held, in *People vs. Rochester R. & Light Co.* 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N.S.) 998.

The easement of a property owner in a private way across a railroad track is held, in *McKinney vs. Pennsylvania R. Co.* 222 Pa. 48, 70 Atl. 946, 21 L.R.A. (N.S.) 1002, to be extinguished by his joining in a proceeding to establish, against the will of the railroad company, a public road upon the private way.

Payment by one joint debtor, who has been discharged in bankruptcy, of a sum less than due on the joint debt, which the creditor accepts in satisfaction of the whole debt, is held, in *Ex parte Zeigler* (S.C.) 64 S. E. 513, 21 L.R.A. (N.S.) 1005, to operate as such in favor of the other debtor.

That one is guilty of a sale in violation of the local-option law who secures whisky for another upon a prescription which he has procured for his own use is held, in *Hawkins vs. State* (Tex. Crim. App.) 114 S. W. 813, L. R. A. (N. S.) 1008.

*In the Court of Common Pleas of Lackawanna County.**No. 1464 September Term, 1909.**William Utley vs. J. Abner Cobb.**Rule to Quash Writ of Ejectment.*

Where a plaintiff, after having been ruled to bring an action in ejectment, neglects to bring his action till after the lapse of the statutory period of six months, the defendant, on rule to quash the writ of ejectment, is entitled to judgment. The statutory period of six months in this case cannot be extended by order of court.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. I. H. Burns and L. P. Wedeman, for defendant.

Opinion by E. C. Newcomb, A. L. J.

December 13, 1909.

The regularity of the writ is attacked because it was issued more than six months after plaintiff had been ruled to bring his action. That proceeding was had to No. 658 January Term, this year, and this should have been given the same number. The rule was taken under the Act of March 8, 1889, P. L. 10, as amended by that of April 16, 1903, P. L. 212. It was duly served on plaintiff January 4th. After answer and hearing, it was made absolute June 28th. The six months expired July 4th, and the action was brought August 25th.

The present motion is contested only on the ground that the time was extended by an informal order of Court, not in writing nor founded on any application in writing. It is only alleged that within ten days after the time expired such order was made at plaintiff's request. It is to be noticed there is no claim that the extension was specific, or for any definite period. The reason for that will appear.

We think this is no answer to the motion to quash. Yet it is true that an informal request was made as alleged, and at that time the Court indicated a willingness to allow it. But this was followed by no application in form and, therefore, we had no occasion to examine the question involved until the present motion challenged the writ, which seems to have been issued by plaintiff at his own convenience without further ceremony or concern in the premises.

Clearly his status is not that of a party to whom, on reasonable cause shown, an extension had been granted pending the six months. Had that been done, and, on the faith of the order he had suffered the statutory time to go by, a different question might be presented. But here no advantage has been lost by reason of the supposed order. Plaintiff was not thereby lulled into a false sense of security. For the time having then fully run he had no legal right to lose.

The informality of the order may be waived. For the purpose of discussion it may be assumed that an order in due form was made and filed extending the time, say, to September 1st, and that the motion now is to vacate it. We are dealing then with an express limitation of a right of action as defined by statute. The question arises: By what authority may the Court meddle with that, either by extending or shortening the period so limited? Certainly by none appearing on the face of the statute. True, what might happen if the six months should expire, without suit brought, while a rule is pending which should in the end be made absolute, is as yet an open question. It would seem quite unreasonable to deny a party the poor privilege of awaiting the disposition of the rule before going to law. It is possible a case might in that way arise where suit would be considered well brought after the six months had run. Where in such case suit was brought after the time had run, but *before* the rule was disposed of the Supreme Court sustained it by holding that the rule was properly discharged upon suit being entered: *Herron vs. Fetterman*, 14 W. N. C., 480. But there is no analogy between the present case and the one supposed; and the case cited involved no attempt to enlarge the terms of the statute by mere order of Court. Questions springing from the exigencies of procedure over which the party has no control can be dealt with only when they arise. The rule here was disposed of within six months. No doubt the statute contemplates that, and, if made absolute, that plaintiff shall have whatever time remains in which to sue, after which he is concluded: *Gabler vs. Black*, 210 Pa., 541. Had it been intended that the six months should be subject to extension by the Court it would have been so provided, as in analagous instances. In the absence of such provision an attempt to extend

the time would be a mere arbitrary assertion of judicial authority. Hence the order as assumed in this case was *ultra vires* and void.

Let the writ and this motion be re-numbered and filed as of No. 658 January Term, 1909; thereupon the motion is allowed and the writ quashed.

In the Court of Quarter Sessions of Lackawanna County.

No. 278 October Sessions, 1909.

Commonwealth vs. Michael Hegedus.

Motion to Quash Indictment.

It is sufficient ground on which to quash an indictment that, during the examination of witnesses before the Grand Jury, the official stenographer of the District Attorney should be present to take notes of the testimony for subsequent use by the District Attorney.

Mr. Morgan S. Kaufman, for motion.

Mr. D. J. Reedy, contra.

Opinion by E. C. Newcomb, A. L. J.

November 22, 1909.

The basis of the motion is not disclosed by the indictment itself which is apparently regular. It is attacked for irregularity in the proceeding before the grand jury which returned it. The facts are put on record by the Commonwealth's demurrer to the motion. It thus appears that the validity of the indictment is challenged on the ground that the district attorney's official stenographer was present in the jury room during the examination of the Commonwealth's witnesses, in order to get stenographic notes of the testimony which he afterwards transcribed for the district attorney's use in the further prosecution of the case. There is nothing to show affirmatively that the stenographer retired before the grand jury took up their deliberations on the evidence. But it is, perhaps, fairly so implied by the terms in which his presence is alleged: It is averred that he "appeared before, and was present with, said grand jury during the time that the testimony of the witnesses was taken," etc. To this is added the averment touching his transcript for the district attorney's official use thereafter. At all events it was mutually assumed by counsel in the argument at bar that the sten-

ographer was present only during the examination of the witnesses, and participated in the proceedings in no way other than by taking notes of their testimony. It will, therefore, be so assumed now.

The question, then, becomes identical with that decided by this court in *Commonwealth vs. Kositchy*, No. 388 October Sess., 1907, reported in 17 D. R., 778. We see no reason to change the views therein expressed, and can add nothing to what was said on that occasion. For the reasons there stated the demurrer is overruled and the indictment quashed.

Whether or not the defect in a wooden drain running under a sidewalk, which had been constructed by the municipality, and not repaired for several years, and the end of which, where it became visible in the street, was plainly decayed, had existed for such a length of time as to come within the exception to a provision of a statute exempting the municipality from liability for defects in streets except where they had existed for such unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the city council, is held, in *Montgomery vs. Comer* (Ala.) 46 So. 761, 21 L.R.A. (N.S.) 951, to be a question for the jury.

One who, after entering a building with a plate glass front, walks against and breaks a pane of glass in attempting to leave the building, is held, in *Clardy vs. Hudspeth* (Ark.) 115 S. W. 1134, 21 L.R.A. (N.S.) 702, not to be able to escape liability for the value of the broken glass by the fact that, because of the puzzling effect of the interior view, he did not see the glass; since, knowing of its existence, he is held to be bound to ascertain its location before attempting to make his exit, which would bring him into proximity with it.

The fact that a foreman directing the loading of wheels into a car undertakes to block them, so as to prevent their rolling back on the workmen, is held, in *Rippy vs. Southern R. Co.* 80 S. C. 539, 61 S. E. 1010, 21 L.R.A. (N.S.) 601, not, as matter of law, to prevent his negligence in performing that act from being within a constitutional provision making the master liable for injuries to servants resulting from negligence of a superior officer having a right to control or direct the services of a person injured.

In the Court of Common Pleas of Lackawanna County.

No. 527 May Term, 1908.

In Re; Paving and Grading of Larch Street.

Petition to Strike Off Viewers' Report, Etc.

Viewers to assess costs etc. on account of street improvements are appointed May 1, 1908; their report is filed June 25, 1908, and confirmed July 27, 1908; the work is begun in October, 1908, and completed before November 23, 1908. On September 20, 1909, A, B and C, owning property on line of improvements, who made no claim and received no award for damages before the Viewers, move to have the proceedings opened, alleging that they permitted the time for appeal to elapse by reason of the assurances of the City Engineer to the effect that there would be no material change of grade and no damages to their property. From the testimony it appeared that the change became apparent in October, 1908, when the work was begun.

Held:—That the petitioners were guilty of laches, and the report will not be opened.

Messrs. A. A. Vosburg and B. F. Tinkham, for Petitioners.

Mr. D. J. Davis, City Solicitor, contra.

Opinion by E. C. Newcomb, A. L. J.

January 3, 1910.

Viewers to assess cost, expenses and damages on account of street improvements were appointed May 1, 1908. They made report June 25th which was confirmed finally July 27, 1908. September 20, 1909, the three petitioners herein joined in the application to have the proceedings opened. Each is the owner of a lot on the line of the improvement. They made no claim before the viewers for damages, and none were awarded. This, they say, was due to the assurance of the city engineer, at the time of the view, that there would be no material change of grade to affect their properties. To the contrary of that, they allege, there was in fact a material change to their injury.

The specific reason upon which they rest their claim for relief is that on the faith of the engineer's assurance they let the time for appeal expire.

This contention may be true, as the time expired late in August, and under the evidence submitted it cannot be said with certainty that the work began before October, 1908. But it is evident that the work was completed before the 23rd of November that year.

That's not all. One of the petitioners testifies the change became apparent as soon as the work began in October, 1908. The other two were not questioned on that point.

Clearly the nature of the case was such as to call for prompt action on their part,

While it is admitted that the engineer's assistant gave the assurance alleged, it is contended that was in conformity with the plan and profile; that the work was done accordingly; and in fact there was no substantial or material change. This appears by the depositions on the part of the city.

It also appears very questionable whether the thing complained of was not a change between the curb and the fence lines by the unauthorized act of the contractor. The contract, like the ordinance, had to do only with the curb and the face of the street between curbs.

Thus, there is a marked dispute as to the merits. Had the petitioners moved promptly the doubt in that regard might on this motion be resolved in their favor. But practically a year went by, without action, after they claim to have had knowledge of the alleged injury. Nothing short of a clear case would justify us in overlooking their apparent laches in the matter. The case presented is by no means clear; but, on the contrary, very doubtful so far as regards the city. If the parties suffered at the hands of the contractor, the responsibility is his and not that of the city.

The rule to show cause is discharged.

A lease of real property at a monthly rental to a person, his heirs, executors, administrators, and assigns, for the full term of while he shall wish to live in a certain place, from and after a certain date, is held, in *Thompson vs. Baxter* (Minn.) 119 N. W. 797, 21 L. R. A. (N. S.) 575, to vest a life estate in the tenant, terminable only at his death or removal from such place, and not to create either a tenancy at will, at sufferance, or from month to month.

The adoption of a child under the statutes of one state is held, in *Brown vs. Finley* (Ala.) 47 So. 577, 21 L. R. A. (N. S.) 679, to confer upon him no rights of inheritance in lands in another state.

In the Orphans' Court of Lackawanna County.

No. 320———Year 1906.

IN RE: The Estate of Frank Rauschmeier, Deceased.

*Sur Citation to Show Cause Why Executors Should Not Give
Security.*

*Executors—Mismanaging Estate—Insolvency of Executor—Bonds—
Act of 1832, P. L. 190.*

A decedent by his own Will names his executors who duly qualify and continue to perform their duties as such. The Widow of decedent subsequently comes into Court and, on petition, seeks to compel the executors to give bond on the ground (1), that they are not possessed of any property except what comes to them from the Will of decedent, and (2), that as neither has any real estate, both are likely to become insolvent. The executors in their answer deny both allegations and on the hearing it appears that both are possessed of some personal property.

Held: That the burden of proof in such cases is upon the petitioner and that the Court will not require the executors to give bond in the absence of testimony to show that they are mismanaging the affairs of the estate or are likely to become insolvent.

Mr. John F. Murphy, for petitioner.

Mr. A. D. Dean, for respondent.

Opinion by M. F. Sando, P. J.

This proceeding is based upon the petition of Maria Rauschmeier, the widow, for a citation to the executors of the will of the testator to give security under the provisions of the 22d section of the Act of 1832, P. L. 190.

The petitioner is appealing to the Court under a statutory proceeding, and it is a well established principle of law that a statute must be strictly construed.

In her petition, the widow alleges grounds on which she asks that the executors be compelled to give security: (1) that neither of the executors are possessed of any property, except what they inherit under and by virtue of the terms of the will, and (2) that as neither of the executors have any real estate of their own they are both likely to become insolvent and waste or mismanage the property under their charge.

To the citation the executors filed their answer, which traverses all the material allegations of the petition. The burden of proof is therefore upon the petitioner to satisfactorily establish the truth of her allegations.

Frank Rauschmeier died May 27, 1906, leaving to survive him a widow and eleven children, and by his last will and testament dated June 3rd, 1904, appointed his sons Frank Rauschmeier and William Rauschmeier executors. His real estate consisted of five hundred acres of farm land, situate in Jefferson Township, Lackawanna County. The executors filed an inventory showing a personal estate amounting to \$33,369.09. The widow declined to accept the provisions of the will and elected to take under the intestate laws.

As an executor is appointed on a special trust, he is not required, in the first instance, to give security for the faithful execution of the trust. But as the assurance of the testator may be abused, on complaint that the executor is liable to prove insolvent etc., the Orphans' Court may compel him to give security in such sum, and with such sureties, as may be deemed reasonable.

It is contrary to the spirit of the law to ask executors, in whom the testator had confidence, to give security, unless they are wasting or mismanaging the estate. This is very clearly and distinctly set forth in Parson's Appeal, 82 Pa., 465, where the Court, inter alia, says: "It must clearly appear that the executor is wasting or mismanaging the property or estate under his charge or that for any reason the estate or property is likely to be jeopardized * * * * *

before the Court can interfere.

Insolvency is the state of a person who from any cause is unable to pay his debts in the ordinary or usual course of trade: Levan's Appeal, 112 Pa., 294.

The executors by their answer denied the allegations of the petition, and at the hearing it appeared that one of the executors was worth \$2500 in personalty, consisting of cash, farm stock and machinery, and the other executor was worth \$2000, consisting of cash and stock in a building and loan association.

Upon a careful examination of the testimony, we can find no proof that either of the executors are mismanaging the estate or that they are likely to prove insolvent. No past nor prospective injury to the estate has been indicated. The allegations of the petitioner must be established by competent proof. The cases cited by counsel for the petitioner do not establish that a decree will be made in the absence of satisfactory proofs of insolvency or mismanagement.

The facts appearing from the petition, answer and the testimony taken at the hearing do not bring the application within the object and purpose of the act of 1832.

Now November 6th, 1907, the petition to show cause why Frank Rauschmeier and William Rauschmeier, executors, should not give security, is dismissed.

In the Court of Common Pleas of Lackawanna County.

No. 63 May Term, 1908.

Rule for a New Trial.

Henry J. Campbell vs. The Borough of Olyphant.

Property Owner—Contributory Negligence.

Where a property owner allows his property to remain exposed to the ravages of the usual or ordinary storms at certain periods of the year, he is guilty of contributory negligence and cannot recover.

Mr. James J. O'Malley, for plaintiff.

M. Peter L. Walsh, for defendant.

Opinion by H. M. Edwards, P. J. January 3, 1910.

It was with some hesitation that a rule for a new trial was granted in this case. The case was fairly and thoroughly tried; and when the controversy was fresh in the mind of the trial judge he was strongly of the opinion that the verdict of the jury should not be disturbed. The main reason why the rule was granted relates to the instructions of the court as to the contributory negligence of the plaintiff in allowing his property to remain exposed to the ravages of the usual or ordinary storms occurring at certain periods of the year. After a review of the case we are satisfied that the instructions were in accordance with the principles laid down by text writers and in several adjudicated cases.

"A land owner cannot stand idly by and see his property destroyed by water, if by an effort on his part the injury may be avoided": Taylor vs. Canton Twp., 30 Sup. Ct., 305.

"Undoubtedly it is incumbent in every case upon an injured party to do whatever he reasonably can to lessen the injury": Chamberlain vs. Morgan, 68 Pa., 168.

Several other authorities are to the same effect. The doctrine is peculiarly applicable to the conduct of the plaintiff in the case at bar.

On a final review of the case we believe the verdict ought to stand.

Rule for a new trial discharged.

In the Court of Common Pleas of Luzerne County.

No. 304 February Term, 1908.

Certiorari.

Fenner, Administratrix vs. Prudential Insurance Co. of America.

Service of process—Foreign corporations—Act of July 9, 1901.

The Act of July 9, 1901, P. L. 614, as to service upon registered foreign corporations, must be strictly followed. "Leaving a true and attested copy" is not equivalent to "handing a true and attested copy."

Where the summons is not served by the constable to whom it is directed, and where the plaintiff named in the summons is named as administratrix upon the record, the alderman has no jurisdiction.

C. M. Bowman and G. Fred. Lazarus, for plaintiff.

J. T. Lenahan and R. B. Sheridan, for defendant.

Opinion by Halsey, J., April 26, 1909.

Judgment in this case was taken by default the defendant not appearing on the return-day of the writ. The jurisdictional irregularities as set forth in this record are so striking as to make it necessary that the proceedings be reversed. In the first place, the summons in the case was on Aug. 10, 1906, directed to Hugh A. Turner, a constable in the said county of Luzerne, with direction that he summon the Prudential Insurance Company of America to answer Margaret Fenner in a plea of *assumpsit*. The return on the summons is as follows: "Served Aug. 13, 1906, by leaving a true and attested copy of the original summons with William F. Lawson, the authorized agent of the within named defendant company, to accept service of the summons for the within named defendant company," Hugh A. Toner, constable, 24th ward, Philadelphia, Pa.

"Hugh A. Toner, constable, 24th ward, Philadelphia, being duly sworn deposeth and saith, that the foregoing return as made by him is true and correct. Hugh A. Toner, constable. Sworn and subscribed before me, this 13 August, A. D. 1906. William Gallagher, Magistrate Court 10, Philadelphia, Pa."

In the record of the Magistrate as returned it is set forth:

"Now, Aug. 10, 1906, summons in *assumpsit* to David S. Davis, constable of the third ward of the city of Wilkes-Barre, Pennsylvania,

who deputized the constable of the twenty-fourth ward of the city of Philadelphia, Pa., to get service on the defendant company at Philadelphia. . . ."

"Now, Aug. 13, 1906, Hugh Toner, constable twenty-fourth ward, city of Philadelphia, returns said summons on oath as follows: 'Served this writ on the within named defendant by leaving a true and attested copy of the original summons with W. F. Lawson, the authorized agent of the within defendant company, to accept services of the said summons for the within named defendant company at their office.' . . ."

"Now, Aug. 18, 1906, plaintiff appears in person and by her counsel, Charles Bowman, Esq., between the hours of three and four o'clock in the afternoon. Defendant does not. Plaintiff being duly sworn claims of the defendant \$92.50 on certain insurance policy on the life of the late Eugene Fenner, common law husband of the plaintiff, Margaret Fenner, administratrix of the estate of the late Eugene Fenner."

The summons in this case was never directed to David S. Davis, constable of the 3rd ward of the city of Wilkes-Barre. Therefore, the allegation of the deputation as set forth in the record to Hugh A. Turner by David S. Davis was not justified. There is no record of deputation to Hugh A. Toner to serve the said writ. The return, as appears from the record, was served by Hugh A. Toner, of the 24th ward of the city of Philadelphia.

The Act of July 9, 1901, § 2, P. L. 614, provides for the service of the writ of summons in the case of a registered foreign corporation, partnership, limited or a joint stock company, by serving its duly registered attorney as in the case of a summons issued against him personally, or by leaving a true and attested copy thereof for him at the registered place, if he be not found there during the usual business hours of any business day, with the person for the time being in charge of the business carried on at said place. The return by Toner is "that he served the said summons Aug. 13, 1906, by leaving a true and attested copy of the original summons with William F. Lawson, the authorized agent of the within named defendant company."

The statute is not in words complied with. This act of assembly providing for the service of process, it has been ruled in innumerable cases, must be strictly construed and process served in strict compliance with it. There is a difference in the requirement of the statute, which says "by handing a true and attested copy," and the return of this Philadelphia officer, "by leaving a true and attested copy of the original summons."

While the right of the board of education of a city of the first class to provide separate schools for white and colored children in the grades below the high school, provided equal educational facilities are furnished, is recognized in *Williams vs. Board of Education* (Kan.) 99 Pac. 216, 22 L.R.A. (N.S.) 584, it is held that, where the location of a school for one of these classes is such that access to it is beset with such dangers to life and limb that children of the class for which it is designated ought not to be required to attend it, such children are denied equal educational facilities, and the action of the board requiring them to attend such schools and denying them admission to any other is an abuse of discretion.

A gas company whose employees wrongfully sever the connections by which a rival company is supplying gas to heat a house in which rooms are let to boarders is held, in *Kentucky Heating Co. v. Hood* (Ky.) 118 S.W. 337, 22 L.R.A. (N.S.) 588, to be answerable in damages not only for the cost of replacing the connections, but also for reasonable compensation for the loss sustained by the proprietor of the house in being deprived of tenants, who leave because their rooms become untenable, which will be measured by the profits which he had a right to expect would be received from the rentals, and for personal inconvenience and discomfort suffered by himself.

When a purchaser insists on the specific performance of a contract by a vendor who has agreed to sell a larger interest in land than he has, the vendee is held, in *Melin vs. Woolley*, 103 Minn. 498, 115 N.W. 654, 946, 22 L.R.A. (N.S.) 595, to be entitled to take what the vender can give, and to demand compensation for what he does not give.

In the Court of Common Pleas of Lackawanna County.

No. 839 March Term, 1907.

Rule to Set Aside Assignment.

John H. Short vs. Delaware & Hudson Company.

Bankruptcy—Priority and Assignment of Judgment—Recording Acts.

On August 20th, 1908, A obtained a judgment against B which, by decision of the Appellate Court, became final on October 16th, 1909. In the meantime, on April 24th, 1909, it had been assigned to C in good faith and for a full consideration. On October 20th, 1909, A is declared a bankrupt and on November 10th, 1909 C files its assignment of the judgment, whereupon the trustee for the creditors in the bankruptcy proceedings claims priority as to the judgment under the federal bankruptcy act of 1898, as amended by the Act of February 5th, 1903, sec. 13th, which provides that "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required".

Held:—That the assignment of the judgment to C is not voidable on the ground of preference under the four months' clause of the federal bankruptcy law, and that the assignment of judgment is not required to be filed of record under the recording act of May 24th, 1878, P. L. 138.

Mr. S. B. Price, for plaintiff.

Messrs. Welles & Torrey, for defendant.

Opinion by E. C. Newcomb, A. L. J.

January 10, 1910.

This is a contract for priority as between plaintiff's creditors in bankruptcy and the Scranton Savings Bank to whom the judgment has been assigned. The issue is presented on the petition of the trustee for the creditors and the answer of the bank. The facts are not in dispute. So far as essential to a proper understanding of the case they are few.

The judgment was recovered August 20, 1908. Defendant having appealed, it became final on affirmance by the appellate court October 16, 1909. In the meantime by a writing of April 24, 1909, it had been formally assigned to the bank; but the transfer was first noted of record November 10th. Shortly before that, to wit, October 30th, plaintiff was adjudged a bankrupt on adverse proceed-

ings begun October 25, 1909. November 30th Mr. Hull was duly elected trustee for the creditors, and the present motion followed at his instance.

It is not disputed that the judgment was assigned for a full consideration, nor claimed that the transaction was collusive or in any way tainted with actual fraud or bad faith. It is attacked only as a voidable preference under the "four months" clause of the federal bankruptcy act of 1898, as amended by the act of February 5, 1903. Section 13 of the latter act provides as follows:

"Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The sole question is whether the assignment of a judgment is required to be recorded, within the intent and meaning of the amendment.

I have always assumed that the provision has reference only to registration "required" by statute. The learned counsel for the petitioner here seems to regard the reasoning of the court in *Loeser vs. Bank*, 148 Fed. R., as giving it a much more extensive scope. It was there said by Judge Lurton: "If the instrument giving the preference is one which is permitted to be recorded in order to give it validity as against certain classes of persons, though perfectly valid without record as to other classes, it is an instrument 'required' to be recorded within the meaning" of the amendment.

It must be borne in mind that what the court was there dealing with was an explicit recording act. The case involved the validity of a chattel mortgage in the state of Ohio, under a statute which provided that it must be recorded in order to be valid as against subsequent creditors and purchasers. Indeed that is the only function and purpose of such statutes. The only ground upon which they rest is that of constructive notice. The whole system of recording instruments is of statutory origin and authority. Hence, the courts will not by construction extend the operation of such statutes to instruments not fairly within their terms: 24 A. & E. Enc. L., (2d Ed.) 77 *et seq.* It follows that constructive notice will arise only from the record of

such instruments as fall within the statute: *Ibid.* 142. So, in the case on which counsel relies it was further said: "But, if an instrument is not 'entitled' or 'permitted' to be recorded, its record is of no effect."

The mere practice of noting of record the assignment of a judgment, being only of customary origin, does not in itself support the theory that such instrument is "permitted to be recorded", within the doctrine of the Loeser case. Petitioner must be able to point to some statutory authority for it which would give effect to the record by way of notice to subsequent claimants. He does call attention to the act of 24 May, 1878, P. L. 138. It is contended that this may be regarded as "permitting" the assignment to be recorded. To this I cannot assent. It requires the prothonotary to keep "an index to assigned judgments * * * so as to afford an easy reference to said assignments". This falls far short of the essentials of a recording act. It operates not on the party taking the assignment, but wholly upon the public officer. It doesn't pretend to specify the terms and conditions upon which such instruments shall be deemed capable of being recorded; nor to indicate what, if any, effect the record shall have on private interests. For anything that appears to the contrary its sole purpose may have been to facilitate the work of the taxing officials. Certainly it cannot by construction be enlarged to the proportions of a recording act. If it were so, it would follow that the entry of an assignment would be notice to the judgment debtor. But the contrary has been held as well since as before the passing of the act: *Henry vs. Brothers*, 48 Pa., 70 (1864); *Work vs. Prall*, 26 Pa., Sup. Ct., 104 (1904).

The petitioner is not entitled to the relief asked for, and the rule to show cause is discharged.

A provision in a standard insurance policy, the form of which is prescribed by statute, that no agent shall have power to waive any condition unless the waiver is endorsed on or added to the policy, is held, in *Black vs. Atlanta Home Ins. Co.* 148 N. C. 169, 61 S. E. 672, 21 L. R. A. (N. S.) 578, not to be waived by parol, and an attempted consent to additional insurance which is not so endorsed, as required by the policy, is held to be without effect.

A complaint which states, in substance, that the defendant, a banker and a man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined, is held, in *Tuttle vs. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L.R.A. (N.S.) 599, to state a cause of action.

Charter authority to operate a railroad is held, in *Alabama & V. R. Co. vs. King* (Miss.) 47 So. 857, 22 L.R.A. (N.S.) 603, not to absolve the corporation from liability for injuries to abutting property because of the operation of the road in such manner as to constitute a private nuisance.

A labor union is held, in *Lohse Patent Door Co. vs. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L.R.A. (N.S.) 607, to be guilty of an illegal boycott by notifying, in pursuance of a conspiracy to injure the business of one against whom a strike has been declared, customers of such persons that its members will not handle material furnished by him, and that any attempt on their part to force them to do so will cause a strike to be called against them.

A street constructed under statutory location terminating at high-water mark on the seashore is held, in *State vs. Yates*, 104 Me. 360, 71 Atl. 1018, 22 L.R.A. (N.S.) 592, to continue to high-water mark when the shore line is extended by accretion, although the terminus was described, in addition to the designation of high-water mark, as a certain distance from the point of beginning which, at the time, was high-water mark.

That a side track of a railroad cannot be regarded as for public use, where it reaches a private factory, and the railroad company has connected for its use only when it can use it without interfering with the business of the manufacturer, is held in *Pere Marquette R. Co. vs. United States Gypsum Co.* 154 Mich. 290, 117 N. W. 733, 22 L.R.A. (N.S.) 181.

In the Court of Common Pleas of Fayette County.

No. 132 December Term, 1907.

Motion for a New Trial and for Judgment non obstante veredicto.

Flemming vs. Connellsville Borough.

Road Law—Change of Grade—Act of May 24, 1878.

An action for damages caused by the change of grade of a street by borough officers, without resolution of the council authorizing the work or any formal ratification, where there has been no actual taking of property, is properly instituted by a petition for viewers under the Act of May 24, 1878, P. L. 129.

It is sufficient if there is evidence from which a jury would be warranted in finding that the work was done by the borough.

It is not necessary that there should be a ratification of the action of the officers of a borough by a formal ordinance.

Damages—Increased flow of surface-water.

A borough is not liable for damages by an increased flow of surface-water over property, caused by changes in the character of the surface, produced by the grading of streets in the ordinary and regular course of its expansion. But if the grading is done in such a way as to divert the surface-water of a large territory from its natural course, and gather it into a body and throw it upon the plaintiff's premises, the borough is liable.

Thomas H. Hudson, for plaintiff.

E. C. Higbee and S. R. Goldsmith, for defendant.

Opinion by Van Swearingen, J., April 13, 1909.

This is an action to recover damages alleged to have been sustained by reason of the change of grade of a public alley in the rear of plaintiff's property, in the borough of Connellsville. The proceeding was commenced by a petition of the plaintiff for the appointment of viewers under the Act of May 24, 1878, P. L. 129, and came into court on an appeal from the viewers' award. The testimony taken at the trial shows that the actual filling in of the alley was done by the borough officers, and that it was so done is not denied. There was some evidence to the effect that a resolution was passed by the council of the borough authorizing the work to be done, but no such resolution appears of record. There is some evidence from which a ratification of the work after its completion may be found, but no formal ratification has been shown. At the close of the trial we were asked to give binding instructions for the defendant, on the ground that proceedings under the Act of 1878 cannot be sustained where there was no formal ordinance authorizing the change of grade or

ratifying it after it was made, it being claimed that the remedy in such case is by an action of trespass. We refused to give the instructions requested. The jury returned a verdict of \$500 for the plaintiff, and we are now asked to enter judgment for the defendant *non obstante veredicto*.

We cannot agree with the position taken by counsel for the defendant. As we understand the law, in all cases where damages are sought to be recovered for injuries incidentally resulting from changes of grades or other alterations of the surface of public streets by a municipal corporation, except for negligent performance of the work, the statutory remedy by appointment of viewers must be followed, and it matters not whether the work was done under authority of an ordinance in the first instance or by the municipal officers without previous authority, where their unauthorized acts are subsequently ratified by the municipality. This has been held to be the law in all cases where the question has been expressly raised. It is to be noted that none of plaintiff's property was taken, and consequently the adjudicated cases for the taking of private property, cited by counsel, do not apply. The latest case on the subject and one which we think is final and conclusive on this whole matter is that of *Deer vs. Sheraden Borough*, 220 Pa. 307, where Mr. Justice Elkin, speaking for the Supreme Court, said: "In the present case appellees have brought an action of trespass to recover damages for the alleged injuries, which action cannot be sustained under the authority of our cases for injuries resulting from a change of grade. There was no actual taking of property, and, therefore, the decisions relied on by the learned counsel for appellees which hold that an action of trespass will lie against a municipality for the illegal taking of, or physical injury to, the property of an abutting owner, having no application. The only injury complained of in the present case is that which incidentally results to an abutting property owner by reason of the change of grade, and in such a case the statutory method which provides for compensation and the assessment of damages must be pursued. This is the rule of all cases: *Beltzhoover Borough vs. Gollings*, 101 Pa. 293; *White vs. McKeesport Borough*, 101 Pa. 394; *Robinson vs. Norwood Borough*, 215 Pa. 375; *McKee vs. Pittsburg*, 7 Pa. Superior Ct. 397. It is further argued that there was no ordinance authorizing the grading

of the street, and that the attempt to grade without the authority of an ordinance is in the nature of a tort, and that an action of trespass will lie to recover for any damages sustained. This position is unsound for two reasons: first, because the statutory remedy hereinbefore discussed must be followed; and, second, there was an ordinance in the present case to pave and curb the street, under which there is an implied authority to do every thing necessary or usual in curbing and paving, including such changes in the grade as are necessary or essential to the paving: *Dillon on Municipal Corporation* § 797; *Schenley vs. Com.*, 36 Pa., 29; *Lewis vs. Homestead Borough*, 194 Pa., 199. Again, even if the change of grade should be held to have been made without an ordinance authorizing it in the first instance, the act of the officers or agents of the borough in so doing may be ratified by the borough subsequently: *Dillon on Municipal Corporations*, § 463; *Silsby Mfg. Co. vs. Allentown*, 153 Pa. 319; *In re Shiloh Street*, 165 Pa. 386. We conclude, therefore, that appellees have mistaken their remedy; that an action of trespass does not lie under the facts of the present case, and that the statutory remedy for the assessment of damages should have been followed. Judgment reversed and is here entered for defendant."

It has been held that where no specific grade has been fixed by the borough but changes in the actual grade of a street are made from time to time in repairing the highway, the borough is answerable for the injury to property, resulting from such changes: *Rothwell vs. California Borough*, 21 Pa. Superior Ct. 234. In the case last cited the action was in trespass, but the question as to the proper form of action was not at issue. What the result would have been if that question had been raised is indicated by the following very significant language of the Superior Court: "No objection to the form of the action was made in the court below, nor has that question been argued here, and for that reason we do not deem it incumbent upon us to consider it. The learned counsel who represented the appellant has confined his argument to the merits of the case, the right of the plaintiff to recover, under the evidence, in any form of action." And where property was damaged by a change made by the borough authorities in the location of the abutments of a bridge, which was part of a public highway, it was held that the remedy was by the

appointment of viewers under the Act of 1878, and not by an action of trespass: *Power vs. Ridgway Borough*, 149, Pa. 317.

The acts of a municipal corporation may be proved otherwise than by its records or some written document. It is sufficient if there is evidence from which a jury would be warranted in finding that the work was done by the borough: *Bohan vs. Avoca Borough*, 154 Pa. 404; *Weir vs. Plymouth Borough*, 138 Pa. 566; *Oakley vs. Luzerne Borough*, 25 Pa. Superior Ct. 425. There is such evidence in this case. But even if the work had been done without previous authority, as we have seen in *Deer vs. Sheraden Borough*, 220 Pa. 307, the performance of the work could be ratified subsequently by the borough. And it is not necessary that such ratification should be by a formal ordinance. An acceptance of the work is sufficient: *Sandy Lake Borough vs. Gas Co.*, 16 Pa. Superior Ct. 234; *Amberson Avenue*, 179 Pa. 634. There was evidence at the trial from which the jury would be warranted in finding that the work had been ratified by the borough even if not previously authorized. At no time has the performance of the work been disavowed by the defendant. There is evidence in the case indicating that the improvements on this alley were made by the borough at the instance of the board of health for sanitary reasons. A change from the natural grade is a change of grade just as clearly as if changed from a grade previously made by the authorities: *New Brighton Borough vs. United Presbyterian Church*, 96 Pa. 331.

We are entirely satisfied that the plaintiff was right in following the statutory remedy in this case, and the motion to enter judgment for the defendant *non obstante veredicto* must be denied.

Defendant's counsel also filed a motion for a new trial, assigning certain reasons therefore, none of which, we think, are sufficient for granting a new trial. We cannot say that the verdict of the jury was excessive under the evidence. The verdict is for only one-third of the amount which the property was injured, according to the estimates of the plaintiff and her husband. It is but one-half the amount testified to by one of the other witnesses called on behalf of the plaintiff, and is the exact amount testified to by another. It is true six witnesses called on the part of the defence testified that the market value of the property had not been depreciated to any extent whatever. But the jury first visited and viewed the premises for

themselves, and then listened to the testimony produced in court, and, as we believe, tried the case fairly and impartially, and we see no reason for interfering with their verdict. Counsel complain of the admission of certain testimony relative to the flowing of water on to the plaintiff's premises. When this testimony was first offered, it was objected to "unless it is shown hereafter that the filling in was done according to plan adopted by the borough, or that it was done and accepted by the borough." This objection was overruled. No objection on any other ground was made. There was some assertion to the effect that before the alley was filled in there had been an open drain or watercourse of some kind along the side of the alley and between it and the tracks of the Pennsylvania Railroad, which lay on the opposite side of the alley from the plaintiff's property, and that at a point near the property of plaintiff it emptied into a large closed sewer. The nature and character of this drain or watercourse was uncertain. The filling in of the alley filled up this drain, and it was the water in part which had been accustomed to flow therein that was thrown over on the plaintiff's lot. Under these circumstances, we thought it proper to admit the testimony relative to the water thrown on plaintiff's property, so that all the facts might clearly appear. The borough would not be liable to the plaintiff for an increased flow of surface-water over or on to her property, arising merely from the changes in the character of the surface produced by the grading of the alley in the ordinary and regular course of expansion of the borough: *Strauss vs. Allentown*, 215 Pa. 96; *Carr vs. The Northern Liberties*, 35 Pa. 324; *Fair vs. City of Philadelphia*, 88 Pa. 309. But if the grading of the alley was done in such a way as to divert the surface-water of a large territory from its natural course and gather it into a body and throw it upon plaintiff's premises, the borough would be liable: *Bohan vs. Avoca Borough*, 154 Pa. 404; *Weir vs. Plymouth Borough*, 148 Pa. 566. The proof in this case, however, did not come up to the standard necessary to make the defendant liable on account of the water. In other words, it had not been shown at the conclusion of the trial that any natural watercourse had been diverted and the water thrown on the property of plaintiff, and we instructed the jury specifically, both in our general charge and in answer to defendant's points, that the defendant was

not liable in this case for the surface-water turned on to plaintiff's property, and that if that were the only damage complained of, the plaintiff would not be entitled to recover, and that they should eliminate wholly from their consideration all the testimony concerning the water and arrive at their verdict wholly independent thereof. There was no objection to any of the testimony relative to the water, except to that of the first witness, and the only objection then was the one hereinbefore quoted, which we think was properly overruled. We have gone over the whole case carefully and we see no reason why the verdict of the jury should be disturbed.

And now, April 13, 1909, after argument by counsel, and upon due consideration, it is ordered that the motion for judgment *non obstante veredicto* be and the same is hereby denied; that the motion for a new trial be and the same is hereby overruled and dismissed, and that a new trial be and the same is now refused, and that judgment be entered on the verdict upon payment of the jury fee.

A local railroad company operating a system of tracks wholly within a county of a state, for the purpose of shifting cars between shippers and trunk lines, and between trunk lines, for which it makes an arbitrary charge per car, which it collects from the railroad companies, is held, in *Belt R. Co. vs. United States* (C. C. A.) 163 Fed. 642, 22 L.R.A. (N.S.) 582, to be, while engaged in shifting between two trunk lines a car *en route* from one state to another, engaged in interstate commerce so as to be within the operation of the safety-appliance act of Congress.

A draft secured from a bank, which, for a fraudulent purpose, without its knowledge, is made payable to one having no interest in the transaction, whose indorsement is subsequently forged thereon by the person guilty of the fraud, is held, in *Seaboard National Bank vs. Bank of America*, 193 N. Y. 26, 85 N. E. 829, 22 L.R.A. (N.S.) 499, not to be payable to the order of a fictitious or nonexistent person if the bank does understand such to be the fact, within the meaning of the negotiable instruments law, making drafts in favor of such persons payable to bearer.

In the Court of Common Pleas of York County.

No. 130 August Term, 1908.

Demurrer.

Commonwealth vs. Ostendorf, et al.

*Constables' bonds—Actions upon—Jurisdiction of justice—Copies of
bond and notice—Affidavit—Act of March 21, 1772.*

The form of action upon a constable's bond is *assumpsit*.

A justice has no jurisdiction of an action on a constable's bond.

A copy of the bond and of the notice, required by the Act of March 21, 1772, 1 Sm. Laws, 365, must be attached to the statement of claim and reference thereto be made in the affidavit to the statement.

J. R. Strawbridge, for demurrer.

Logan & Logan, contra.

Opinion by Wanner, J., March 8, 1909.

The defendants' first exception is not sustained. Both the amount of the bond itself and the aggregate of the damages claimed in the action are beyond the jurisdiction of a justice in amount. It was held in *Blue vs. Com.*, 4 Watts, 215, that a justice of the peace had no jurisdiction of a suit upon a constable's bond, and this decision was recognized in *Miller vs. Stem*, 12 Pa. 383. There has been no reversal of either of these cases in the Supreme Court, and they are, therefore, to be recognized as authority, though a case in one of the lower courts was ruled to the contrary on the authority of a decision earlier in date than that of *Blue vs. Com.*, 4 Watts, 215.

Since those earlier decisions the Act of June 14, 1836, P. L. 638, was passed. Under the provisions of section 6 of said act, it is evident that a suit in the common pleas is the proper form of enforcing a constable's bond. The directions in said act as to the pleadings and the making of the judgment a lien upon the real estate of defendant are not consistent with the form of procedure before a justice of the peace. This act applies to suits on all forms of official bonds, and seems to be intended as a substitute for former legislation on the subject.

The second exception is sustained. Section 3 of the Act of May 25, 1887, P. L. 271 and also Rules Nos. 2 and 3, under title "Pleadings," in the rules of this court, require copies of all notes, contracts

and obligations sued upon to accompany the plaintiff's statement in an action of *assumpsit*. Said rules of court also require such copies of the instrument in suit to be served on the defendant along with statement. The failure to comply with these requirements has always been held sufficient to prevent a judgment being rendered against defendant by default for want of a sufficient affidavit of defence.

Demurrers to plaintiffs' statements have also been sustained for the want of such copy, as well as where the copy filed with the statement is incomplete: *Com. vs. Graeff*, 14 Dist. R. 723; *Barry vs. Phoenix Mutual Life Ins. Co.*, 8 Del. Co. Reps. 88; *Campbell vs. Pittsburg & Western Ry. Co.*, 137 Pa. 574.

In this case the plaintiff has failed to file a copy of the official bond on which suit is brought, and also a copy of the written notice alleged to have been served upon the constable, previous to the bringing of this suit. As without the latter notice the plaintiff cannot recover, a copy of said paper should be filed with the statement: *Com. vs. Warfel*, 157 Pa. 444.

The fourth exception is to the sufficiency of the affidavit attached to the statement. It seems to be in the form required by the Act of 1887 and the rules of this court, except that it does not aver the correctness of any copy of the bond or notice above mentioned. As those copies should have been filed, the affidavit does not fully comply with the directions of the act.

The demurrer is sustained, with leave granted to the plaintiff to amend his statement, and the defendant is required to plead or to answer the same within fifteen days after service of a written notice of the filing of said amendment.

An innkeeper is held, in *Rockhill vs. Congress Hotel Co.* 237 Ill. 98, 86 N. E. 740, 22 L.R.A. (N.S.) 576, not to be relieved from liability for the value of jewels forming part of the contents of a hand bag of a guest, which is lost while in the actual possession of his servant, by a statute requiring him to keep a safe and post notices that he will not be liable for the valuables not delivered for deposit therein, and upon compliance therewith he shall not be liable for loss unless it shall occur by a servant employed by him in the inn.

In the Court of Common Pleas of Lackawanna County.

No. 11 September Term, 1909.

In Equity.

John McCabe, Henry T. Fenwick and John R. Cameron vs.

City of Carbondale.

Mandatory Injunction—Abatement of Nuisance—Public Disaster.

Where a fire in a mine, owned and operated by a private corporation, reaches the proportions where it may be properly called a public disaster, a mandatory injunction will not issue to compel the extinction of the fire by a city whose present indebtedness has so closely reached the constitutional limit of two per centum that, in order to obtain sufficient funds for the purpose, a special election to increase the indebtedness of the municipality must be ordered; and in such a case the ordering of an election to increase such indebtedness rests entirely in the legislative discretion of the municipal authorities.

Messrs. Vosburg & Dawson, for plaintiffs.

Mr. Louis Gramer, City Solicitor, for defendant.

Opinion by H. M. Edwards, P. J., January 21, 1910.

This case is before us on bill and answer. The answer admits substantially the material allegations of plaintiffs' bill, and there being no replication by the plaintiffs and no exceptions to the answer the affirmative averments of the answer must be taken as true. This, as a matter of pleading, is equivalent to a demurrer to the answer. The case was argued at bar on this basis, the material facts on either side not being in dispute.

Some of the facts to be considered in the present case were before us last year in the case of McCabe vs. Watt, which is reported in McCabe vs. Watt, (No. 1), 224 Pa. 253, and same case, (No. 2), 224 Pa., 259.

In the former case the property holders affected by the mine fire in the city of Carbondale brought suit against the Finn Coal Company and Watt, et al. The Finn Coal Company operated the mine where the fire originated and Watt was the owner of the surface, the partial control over which had passed to the coal company. After a hearing, we held the mine fire was caused by the negligence of the Finn Coal Company, and that it was the duty of this company to extinguish it and thus abate a menacing nuisance. We held also that the

other defendant (Watt) was not liable because he was not at fault in any particular.

In the appeal of the Finn Coal Company the supreme court relieved the company from further liability in the matter for the several reasons given in the opinion in Appeal No. 1, *supra*. The action of the lower court in deciding in favor of Watt was sustained by the appellate court: Appeal No. 2, *supra*.

In the latter case the supreme court said:

"There is nothing in this proceeding to bring appellee within the rule of willful and wanton negligence, nor is there anything to sustain a writ of mandatory injunction against him. If the lives and property of the citizens of Carbondale are menaced by the burning coal mine and the efforts of the owner are unavailing to extinguish the fire, the municipality should take hold of the situation with a strong hand and abate the so-called nuisance just as it would stop the flames of a surface conflagration. The right to protect in such an emergency is not limited by the location of the destructive agency, and the power of the municipality to act is the same whether the fire is in the cellar or upon the roof or above or below the surface of the ground. This fire has reached the public enemy stage; and it should be so regarded and treated by the public authorities. To hold that a state or county or other municipal division, each or all of them, cannot provide protection to the lives and property of citizens threatened with destruction by fire, would be to place the seal of impotency on governmental functions and to deny that protection the law should afford an enlightened people. To fiddle on broken strings while Rome is burning is not in keeping with the spirit and purpose of the present generation."

Following the suggestion of the dictum in the foregoing opinion the plaintiffs in the present case have brought their bill against the city of Carbondale and are asking for a mandatory injunction against the city to compel her to suppress the fire and abate the nuisance. Plaintiffs' bill describes the mine fire, the danger to the property and health of the plaintiffs and others, and it sets forth the decision of the supreme court in the case of McCabe vs. Watt, *supra*. The answer does not controvert the allegations of the bill as to the

menacing conditions therein described; but it excuses itself from responsibility in the matter for the reasons set forth in the fourteenth and fifteenth paragraphs of the answer, which are inter alia as follows:

"As a further answer to the plaintiffs' bill the defendant says that under the laws of the commonwealth of Pennsylvania there is no duty or obligation resting upon it to extinguish or even attempt to extinguish the mine fire in question, which developed upon private property at a time when, and with reference to which, the defendant had no connection whatsoever. And further the defendant says that it is entirely and absolutely without the means with which to attempt to put out said fire. As stated in the answer to the fourteenth paragraph, in order to make any intelligent effort to extinguish the said fire a large amount of money, viz., approximately the sum of one hundred thousand dollars would have to be expended, which said sum of money this defendant does not possess and has no lawful manner of acquiring. The assessed valuation of the property within the limits of the defendant city amounts to \$3,153,636. The present indebtedness of the said defendant city amounts to approximately \$56,000. So that the defendant city is forbidden by the constitution and laws of the commonwealth to incur any additional indebtedness in excess of about \$6,000, for the purpose of providing funds for the extinguishment of this fire or for any other purpose, without authority first had by a vote of the electors of the said defendant city, held for the purpose of authorizing an additional increase of the city's indebtedness."

In a brief way we state the following facts:

1. The mine fire described in the plaintiffs' bill is dangerous to the health and property of the plaintiffs and is a menace to the health of a part of the community of the city of Carbondale. In other words, it is a public nuisance.

2. The expense of extinguishing the fire will amount to about \$100,000. We are of the opinion that these figures are not exaggerated. The plan or scheme for abating the nuisance is an engineering proposition and will require superior skill and much time and labor.

3. The present indebtedness of the city of Carbondale is within six thousand dollars of two per centum of the assessed valuation.

In order to secure money enough to extinguish the mine fire it will be necessary to submit to the voters of the city the question of incurring the additional indebtedness.

In view of the foregoing facts we do not see our way clear to issue the mandatory injunction prayed for in this case. Our personal views as to what the councils of Carbondale ought to do in the exercise of proper civic discretion in the face of the present calamity cannot dictate or control our judicial action. The language used in the opinion of the supreme court as quoted above on this point is much more suggestive, pertinent and emphatic than anything we can say. Our duty now is to dispose of the controversy before us on legal grounds.

We shall here give briefly our reasons for refusing a mandatory injunction.

1. In the present case we cannot order the city of Carbondale to abate the nuisance at the cost of the party who is responsible for its existence. The supreme court has decided this question finally in *McCabe vs. Watt*, supra. In that case it was declared that the Finn Coal Company had done all that it could be expected to do. It had expended a sum equal to the entire amount of its capital stock in its endeavor to extinguish the fire. And in the same case it was decided that the owner of the surface was not at fault. It follows, therefore, that the class of cases which decide that a municipality may abate a nuisance at the cost of him who was responsible for the nuisance do not apply in this case. In the case at bar it will be impossible to charge the \$100,000 either to the mining company or to the owner of the surface.

2. The other class of cases involve disasters and conditions arising from overwhelming necessity. The usual illustration in cases of this kind is that of the tearing down or the destruction by dynamite of a building during a conflagration in order to arrest the progress of the fire and save other property. In such a case the municipality may destroy property without liability for damage. The mine fire in the case at bar comes within the term "disaster"; but it is clear that before the city of Carbondale can proceed to suppress the fire it must provide by ordinance a certain sum of money and thereby

increase the indebtedness of the city beyond the constitutional limitation. In the exercise of legislative discretion the councils may order the matter submitted to a vote of the electors.

We are of the opinion, therefore, that the mandatory injunction in this case should be refused.

Now, January 20, 1910, this cause having been heard on bill and answer it is ordered, adjudged and decreed that the plaintiffs' bill be dismissed at their costs.

The determination by city authorities that public necessity requires the opening or extension of a street is held, in *Grafton vs. St. Paul, M. & M. R. Co.* 16 N. D. 313, 113 N. W. 598, 22 L.R.A. (N. S.) 1, to be conclusive in an action to condemn property for street purposes.

The question of the necessity of closing a public alley is held, in *Henderson vs. Lexington (Ky.)* 111 S. W. 318, 22 L.R.A. (N.S.) 20, to be exclusively for the legislature. An elaborate note to these cases in L.R.A. collates all the authorities on the question of judicial power over the right of eminent domain.

A contract by which stocks are to be purchased and carried by a broker on margin is held, in *Richter vs. Poe*, 109 Md. 20, 71 Atl. 420, 22 L.R.A. (N.S.) 174, to be presumptively valid, and the customer is held to have the burden of showing that it was a mere cover for a gambling transaction.

The negligence of an employee of a corporation operating a logging railroad, in attempting to walk along the track, is held, in *Sawyer vs. Roanoke R. & Lumber Company*, 145 N. C. 24, 58 S. E. 598, 22 L.R.A. (N. S.) 200, not to preclude his holding the company liable for an injury in case he is struck by lightning, and, while lying helpless on the track, is run over by a train, if those in charge of it, by the exercise of proper care, might have discovered his peril in time to avoid the injury, since the negligence of the company is the sole approximate cause of the injury.

In the Court of Common Pleas of Lackawanna County.

No. 9 September Term, 1908.

Haley Stone vs. New York, Ontario and Western Railway Company.

Rule for Judgment non obstante veredicto.

Rule for New Trial.

Negligence—Contributory Negligence—Charge of the Court.

The question of whether certain conduct on the part of the plaintiff in a suit for damages for personal injury amounts to contributory negligence is ordinarily for the jury, as also the question of whether a certain railroad crossing may be called a "country crossing."

When the Court misquotes or omits to discuss an item of evidence in its charge, it is the duty of counsel to call the attention of the Court to this fact before the jury retires.

Mr. John R. Edwards, for plaintiff.

Mr. James E. Burr, for defendant.

Opinion by James J. O'Neill, A. L. J., January 17th, 1910.

The rule for judgment notwithstanding the verdict requires very little discussion. On all the elements of the case the issues were for the jury. The two main questions, viz: the negligence of the defendant and the contributory negligence of the plaintiff, under the authorities, were for the jury. As one case in point we cite: Sloan vs. Philadelphia & Reading R. R. Co., 225 Pa., 52.

The reasons for a new trial relate almost entirely to the charge of the court and the answers to the points. This was the burden of the argument of defendant's counsel. We have examined the charge carefully, and taking the answer to the points and the charge together, we are of the opinion that the jury were adequately instructed. The case was argued at great length by counsel on both sides, and the arguments were particularly dispassionate and judicial in tone. It is true that this is not a matter of record; yet the fact undoubtedly had its effect on the character of the charge. Under all the circumstances we feel a substantial hesitation in setting aside a verdict which is so amply sustained by the evidence because of any complaint touching the charge. We, therefore, overrule the assignment of error on this point.

The second reason assigned for a new trial complains of the action of the Court in refusing defendant's first point. The point is as follows:

"That if the jury find from the evidence that the plaintiff did not stop, look and listen at a place where the view in the direction in which the train was coming was unobstructed there can be no recovery by him."

The difficulty with this point is that it does not fit the evidence.

It is based on one isolated fact which in itself is not conclusive of anything under the evidence.

The third reason requires us to declare to the jury that the crossing where the accident occurred was a "country crossing". This we could not do under the evidence. The character of the crossing was properly left to the jury.

The fourth reason relating to the Court's refusal of defendant's sixth point is open to the same criticism as the second reason already answered.

As to the questions raised by the fifth and sixth reasons the evidence justified the submission of those questions to the jury.

Defendant complains as to the excessive character of the verdict. It could have been larger under the evidence. We do not see how it could not have been much smaller.

In the additional reasons it is claimed that one item of evidence was misquoted in the charge of the Court, and that we failed to comment upon the testimony of two of the defendant's physicians. It was the duty of counsel to call our attention to these matters before the jury retired.

On a review of the whole record, which has but very few exceptions in it, we are of the opinion that the verdict ought to stand.

The rule for judgment *non obstante veredicto* is discharged, and is also the rule for a new trial.

The damages for revocation of a contract to permit an advertisement to run in a periodical for a year is held, in *Ware Bros. Co. vs. Cortland Cart & Carriage Co.* 192 N. Y. 439, 127 Am. St. Rep. 914, 85 N.E. 666, 22 L.R.A. (N.S.) 272, to be prima facie the contract price for the service.

The approval for payment, by a board of county commissioners, of warrants for services rendered and illegally charged for by a district court clerk, which were itemized and which showed on their face the nature of the charges, is held, in *Garfield County vs. Renshaw* (Okla.) 99 Pac. 638, 22 L.R.A. (N.S.) 207, to be sufficient to start the running of a statute which provides that an action for relief on the ground of fraud must be commenced within two years, and that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, as it must be presumed that the claims were allowed and paid with full knowledge of the nature of the services.

An agreement by one having a claim against a decedent's estate, to do everything proper and legitimate to aid the heirs in recovering the estate, in consideration that they pay his claim, is held, in *Smith vs. Hartsell*, 150 N. C. 71, 63 S. E. 172, 22 L.R.A. (N.S.) 203, not to be void as champerty or maintenancer.

An officer is held, in *Alford vs. Doe* (Ala.) 47 So. 230, 22 L.R.A. (N.S.) 216, to have no right, at an indefinite time after witnessing the signature to an instrument, and its delivery to the grantee, to make and attach thereto a certificate of the acknowledgment of its execution on privy examination by a married woman who was a party thereto, without having again had her before him for that purpose.

A statute providing for administration upon the estate of persons who have been absent from their usual places of residence and unheard of for a period of seven years is held, in *Savings Bank vs. Weeks* (Md.) 72 Atl. 475, 22 L.R.A. (N.S.) 221, to operate upon the estate of persons whose absence began before its passage.

The liability of a corporation for infringement of a patent is held in *B. F. Avery & Sons vs. McClure* (Miss.) 47 So. 901, 22 L.R.A. (N.S.) 256, not to be a debt contracted or debt existing, within the meaning of statutes making stockholders and directors of the corporation liable for such debts under certain conditions.

